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REGULATORY NEGOTIATION

JOINT HEARINGS

BEFORE THE

SELECT COMMITTEE ON SMALL BUSINESS

AND THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

NINETY-SIXTH CONGRESS

SECOND SESSION

ON

REGULATORY NEGOTIATION

JULY 29 AND 30, 1980

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REGULATORY NEGOTIATION

TUESDAY, JULY 29, 1980

U.S. SENATE SELECT COMMITTEE ON SMALL BUSINESS, AND THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS,

Washington, D.C.

The committees met, pursuant to call, at 9:30 a.m., in room 424, Russell Senate Office Building, Hon. Carl Levin presiding.

Present: Senators Nelson, Levin, and Boschwitz.

Senator LEVIN. Good morning, everybody. I am pleased to open the 2 days of sessions relating to the concept of regulatory negotiations. I am here as the chairman of the Oversight Subcommittee of Governmental Affairs for the Senate. On my right is the chairman of the Small Business Committee, Gaylord Nelson, and on my left is Senator Rudy Boschwitz, who is also on the Small Business Committee, and I am pleased to be with them here today. I expect that Senator Donald Stewart, who also has a particular interest in these hearings, will be with us later. I am also on the Small Business Committee, so I'm wearing one and a half hats.

Senator NELSON. I wonder if I might say that I have a statement that I will submit for the record. I have a hearing starting shortly at the Finance Committee, so I will be unable to attend this morning.

Senator LEVIN. Thank you, Senator Nelson. Without objection, your statement will appear in the record at this point.

[The prepared statement of Senator Nelson follows:]

STATEMENT OF HON. GAYLORD NELSON, A U.S. SENATOR FROM THE STATE OF WISCONSIN, AND CHAIRMAN, SENATE SMALL BUSINESS COMMITTEE

Today the Committee begins a two day hearing on the subject of regulatory negotiation. Yesterday, Senator Stewart, Senator Levin and I introduced a resolution on this subject, and copies of the accompanying statement will be made available this morning as soon as yesterday's Record arrives. Since this statement presents my view on this subject in a comprehensive manner, I will not make a detailed statement on this subject this morning, but will ask that my statement be reprinted in the Record of these hearings.

Regulatory negotiation is a process in which representatives from industry, labor and public interest organizations voluntarily sit down and attempt to hammer out a reasonable consensus on what the best way to achieve a policy goal in a particular area is. This process has been used nationally in the area of toxic substances, safety rules for meat-packers, and, most prominently, in the entire area of coal policy. Locally, it has been used extensively for a variety of issues, especially facility siting. In all of these areas, participants found—to their surprise—that they were able to find substantial areas of agreement. Moreover, the process opened up lines of understanding and communication, providing a framework in which future policy can be made in a way that is much more sensitive to the needs of all parties.

Our resolution calls for the government to encourage the broadened use of this concept by providing funding for administrative costs, by promising to participate as

an observer in the negotiations, and by agreeing to review the results seriously and carefully. The costs of these projects are minimal—the Coal Project, a two-year negotiation covering almost every coal issue—cost only $400,000. A major lawsuit could easily cover the costs of many commissions. Our hope is that tomorrow the administration will come to tell us that they will accept the proposal. If they do not, however, the resolution will be redrafted as a bill, and we will move to require them to accept it.

This is a concept that has wide acceptance from business and environmental groups. This support is gratifying, for I believe that we have gone too far in attempting to solve everything through adversarial processes. Each side tends to stake out a position that it believes will maximize its bargaining power. This position may or may not have any relationship to the most reasonable approach to a problem. Neither side trusts the other, and a great deal of useful information is lost in the process. Government regulators are brought in to develop detailed rules to govern broad areas of public policy, seeking comments from those affected by the policy only after proposed regulations have been issued. After all the work involved in issuing proposed regulations, however, agencies are understandably reluctant to make major changes. More useful information is lost. Government, being what is it, also tends to encourage the proliferation of rules and regulations by several agencies, each responding to its own constituency, acting to protect and promote its own special interests. The resulting morass of regulation frequently ends up in court, where judges trained in law, not in advanced technologies or environmental science, are forced to make complex decisions. Important regulations are often delayed and everyone's legal costs soar. Business becomes frustrated by the impossibility of dealing with so many regulations and, as the New York Times recently reported, becomes increasingly defensive, while environmentalists harden their positions out of their frustrations with our inability to make progress against major ecological problems.

This whole process has been carried to such an extreme that it is simply no longer national for any of its participants, except perhaps, the lawyers. Regulatory negotiation could be a way to ease the problem.

I want to thank Senator Levin and Senator Stewart for joining me in sponsoring this resolution and chairing these hearings. Senator Stewart has chaired several Committee hearings on economic growth, and this proposal is one of the many that has come out of that important series of hearings. Senator Levin, of course, has been a leader in regulatory reform, and his interest in this issue is greatly appreciated. I am confident that we can work together and see this proposal implemented in the very near future.

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. I am pleased to join with Senators Nelson and Stewart in 2 days of hearings on regulatory negotiation. As chairman of the Subcommittee on Oversight of Government Management of the Government Affairs Committee and a member of the Senate Small Business Committee, I believe the concept of regulatory negotiation can help all of business deal with regulation and small business in particular cope with the regulatory universe.

Regulations often create a great deal of anxiety among the parties will have a stake in their promulgation and implementation. Businesses often see regulations as limiting their profits and infringing on their freedom to function as they would want. Public interest groups believe that the public welfare will be sacrificed in the regulatory process in the name of profits and that they will not be heard. The regulators themselves are often required to attempt to interpret a broad statute and apply it to very specific circumstances with the result being that they are unlikely to please any of the parties involved. Legislators, who thought the problem was solved when they adopted legislation, are faced with a continuing battle during the rulemaking and enforcement process.

The process can be devisive and often the problem addressed by the regulations can never be resolved to anyone's satisfaction. Ex-

tended and expensive litigation often ensues with increasing polarization. The impact of this on small business is even greater as it usually is more difficult and expensive for a small business than for a large business to operate under regulations, and small businesses are less likely to have the resources necessary to fight what they consider to be inequitable regulations.

Regulatory negotiation is an idea well worth exploring and experimenting with. It is simply a process where the interested parties sit down together to try to work out their differences. There is usually a mediator. There are no hard-and-fast rules developed on how to proceed, though generally the areas negotiated have been environmental, health, and safety issues. The United States has had the experiences of several undertakings in regulatory negotiation. The most well known example was several years ago when the coal industry and environmental groups came together and undertook what is known as the "Coal Project." This represented an effort to work out the many differences that existed between these two parties. There was not one specific issue that brought them together, but rather a belief that perhaps an understanding could be reached on public policy which would be of benefit to all involved. The result was 200 recommendations, several of which have been adopted, and others which are currently being reviewed by various Federal agencies. The Coal Project had no formal Federal involvement and was funded primarily from private sources.

Another example was in the area of toxic substances. In this instance, the Conservation Foundation convened sessions with industry and environmental representatives around the implementation of the Toxic Substances Control Act of 1976. The result was a more successful rulemaking process. The Joint Labor-Management Committee for the Retail Food Industry utilized the process to reach an agreement on an OSHA regulation for protective equipment for employees in the meat department of supermarkets. Labor and management agreed on a position and then negotiated an agreement with OSHA that was apparently satisfactory to all.

These examples indicate that solutions and a better understanding of the opposing views can result from regulatory negotiation. What can be negotiated is not limited and can range from discussions on regulations and public policy affecting all aspects of an entire industry to a specific regulation. Over the next 2 days we will hear from witnesses who will relate their specific experiences in regulatory negotiations. We will also receive testimony from a number of organizations in both governmental and private sectors who are involved on an ongoing basis in the questions raised by the regulatory process.

Senator Boschwitz?

Senator BOSCHWITZ. Mr. Chairman, I have really no comment. I will be very interested to hear the witnesses. I too, have to leave briefly around 10 o'clock. I have an Agriculture Committee hearing that I want to participate in. I think this approach is a good approach. It is not clear to me whether the people who write the regulations of the agencies are going to be involved in the discussions or if just the agents of the particular governmental agencies are going to be involved, and I'm interested in hearing what the witnesses have to say.

Senator LEVIN. Thank you, Senator Boschwitz.

Our first witnesses comprise a panel from National Coal Policy Project, and I ask them to please come forward. Mr. Harrison Loesch, I hope I have pronounced your name correctly, Lawrence Moss and Frank Murray. We don't have our usual classy nameplates, so we'll have to have you identify yourselves. Perhaps if you start on my right.

Mr. LOESCH. Mr. Chairman, my name is Harrison Loesch, and I'm with Peabody Coal Co.

Mr. MURRAY. Mr. Chairman, I am Frank Murray with the Center for Strategic and International Studies of Georgetown University. My colleagues have carefully placed me in the middle, as usual.

Senator LEVIN. The proper place for a professor.

Mr. MOSS. I am Larry Moss, the environmental caucus chairman of the National Coal Policy Project.

Mr. LOESCH. I don't do that at a hearing, Mr. Chairman.

Senator BOSCHWITZ. Mr. Chairman, Mr. Gusman is not coming?

Senator LEVIN. No, he will be here separately, as our second witness. I don't know if Mr. Gusman is yet with us or not, but if he is indeed, he will follow this panel. All right, why don't we start off. I don't know if there is any particular order that makes more sense than any other order, but according to my list we were going to call on Mr. Loesch first.

STATEMENT OF HARRISON LOESCH, VICE PRESIDENT, GOVERNMENT RELATIONS, PEABODY COAL CO.

Mr. LOESCH. Well, I think that is appropriate, Mr. Chairman. Thank you very much. The reason being that my statement is very general. It gives a little historical background of the growth of adversarial proceedings, and doesn't really get into the meat of the question we have before us. Incidentally, I have been notified by my good friend, Mr. Moss, that I have overstated the premise of the national coal policy project at the bottom of page 3 of my statement where I say the premise stated that the national interest mandates hugely increased coal production in the next several years. The project didn't really do that. We sort of anticipated we would increase but huge is overstated.

I think the meat of what I have to say is in my statement. I would ask that it be included in the record and I will just give a very brief highlight of it.

[The prepared statement of Mr. Loesch follows:]

STATEMENT BY

HARRISON LOESCH
VICE PRESIDENT, GOVERNMENT RELATIONS
PEABODY COAL COMPANY

Mr. Chairman, there is no question that the regulatory process has become a monster and that a major portion of the monstrosity is the result of its adversarial nature. Over the years, because industry came to believe that the government was against it, not for it, and had no concern for the realities of the field or the production flow, the business segment of our society searched for a protector. The most available protector was a lawyer. And while in the dark ages of the 1950's and 1960's few lawyers -- and those in very specialized fields -- were experts on regulation, that aspect of law, even in the small town hinterlands of our nation, became the biggest growth specialty in the profession.

As a lawyer for many years, I am well aware that by the nature of the legal profession and the training necessary for its proper practice, it has been, is now, and will probably always be essentially adversarial. Many, many years ago -- preceding the mid-19th century -- city lawyers were accustomed to filing suit under the most strict requirements of the complicated old codes of civil procedure before attempting any negotiation of the controversy at hand. We didn't do that so much in small towns such as I practiced in, but when the government began to take a greater hand in our affairs, and regulation became a part of the daily life of the miners,

the farmers, the stockmen, and the lumberers, we began to do so. Since few changes could be negotiated at the local level because of the rigidity of the BLM district manager's instructions or those of the district ranger, or even of the Soil Conservation Service representative, the locus of discussion, argument and lawsuit was transferred from the local scene, first to the regional offices and then to the U.S. District Court.

Unfortunately, with regulation growing like topsy and more and more centralized direction, even this change was not enough, and Washington became the center of conflict.

The 1970's introduced a brand new element in the relationship of the regulatee to the regulator. That element was the fear by Congress, translated to agency action, that open discussion between them during the regulation drafting process would somehow result in conflict of interest, abuse, undue influence and a skewed regulatory scheme. I think this was in large part a ripple effect of Watergate, but in my view, it has been carried to gross excess. Congressman and Senators deny with heat that campaign contributions have any effect on their legislative actions. Why do they believe that professional bureaucrats are less upright, less immune to similar influences?

At any rate, the loss of access, both to the technicians and to the policy people taking part in the regulatory process had severe consequences. Unable to influence the drafting process, the regulatee or the beneficiary of the regulation

took it promptly to a lawyer and then to court. Simultaneously, the federal court system was discovering whole new areas of individual rights and injecting itself more and more into what had been considered the Congressional area. The result was an explosion of lawsuits across the country, and this in turn has caused a huge increase in the required personnel of the courts, the Justice Department, and the legal profession in general. Is there a way, compatible with our Democratic system and the principle of separation of powers, which will relieve the pressure and present a viable, less expensive and quicker solution to the problems?

I am sure I was invited to testify before your Committee, Mr. Chairman, because of my participation in and experience with the National Coal Policy Project. This was an experiment designed to see whether an important segment of regulation is amenable to early agreement between those who, in the customary way, would almost certainly become legal adversaries. The results were mixed, and the influence of the Project is somewhat undetermined. But, I believe that the method represents a possibility that, if generally pursued, could work a real revolution.

The National Coal Policy Project was based upon the perception that our nation must, willy-nilly and despite the environmental risks, rely for a largely increased percentage of its energy requirements on the direct or converted use of coal. If this is true, it mandates hugely increased coal

production over the next 30 or so years.

Taking this premise, how can increased production be accommodated with the least environmentally degrading consequences? Can preliminary agreements avoid the huge expense and delay attendant to lawsuits? Can the environmental community and industry set guidelines and ground rules which will obviate such conflicts?

I think it is fair to say that where the issues are capable of scientific quantification and technological solution, the answer is yes. Even here, however, the process is torturous and must start with a thorough education of the personnel on both sides. It must then continue with constant reminders of adherence to the "rule of reason" and the stern repression of arguments ad hominen and conclude with a rededication to the initial premise.

Where, on the other hand, the problems are those of attitude and philosophy not subject to scientific quantification, I have come to the belief that the only solution is through the courts. For some details of the National Coal Policy Project process, successes and failures, you will hear more from Dr. Murray.

I perceive the possibility of a great benefit through implementation of a resolution along the lines of the one of which this hearing is based. It would primarily open the regulatory process to discussion by those most affected, while avoiding the accusation of undue influence and conflict

of interest. Regarding technical matters, it could be a mechanism for avoiding regulatory overkill of the kind which doubles costs with minimal or no increased benefit to the public. Perhaps the prime example of this kind of thing is the clean air regulation, where a 2.2 percent increase from 97.5 to 99.7 in the removal of particulates doubles the cost of the installation. The utility of the concept depends entirely on its execution. At worst, it would simply provide another layer of bureaucratic procedure, and further delay the issuance of whatever permits might be involved. At best, it would greatly relieve the pressure on the courts, increase the understanding of all concerned of the problems of the opposing sides, change the perception that government is adverse to industry, and increase our blighted productivity. I think it is worth a try.

Thank you.

Mr. LOESCH. My experience with the Coal Policy Project was very positive, but that positiveness was limited, it seems to me on looking back, to areas in which the negotiations or discussions between the respective sides, that is to say, the environmental and the industry sides, were capable of sound, scientific analysis and where either by literary searches or on the ground experimentation, you could determine the answer to a particular question. As I say in the statement, where we later, in some degree, failed to reach the ultimate achievement we hoped for in the project, was in the case of philosophical attitude and where the ingrained personal feelings had a real bearing on policy. Now, in the normal course of regulatory arrangements among the agencies, I don't think that that latter situation would be so likely to arise. Normally, where the real problems have arisen, they have been very specific, very much subject to scientific examination and determination. The Coal Policy Project was based, as you will undoubtedly hear more about from Dr. Murray and Mr. Moss, on rule of reason. That meant that among other things, the individuals concerned in the project were not to cast aspersions on the other side, even if the opening attitudes were very different, and attempt always to use the Golden Rule and good faith.

It turned out pretty well. It required a lot of preliminary work. We started out, many of us, with great pessimism as to whether we could do any good or not. We came to respect each other highly, different as our preconceptions may have been; we came out with a great many things that I think were very valuable, and I would hope that the committee's ideas on the resolution would bear fruit. I believe it may well be that it will need to be refined a bit. I find it

difficult, for one thing, to believe that applicants for a commission should be able to have a veto on who is a member of the commission, which is what the resolution now says. This bothers me, because I think it opens the door to possible bias or jealousy in one direction or another. With that, Mr. Chairman, thank you very much.

Senator LEVIN. Let me just ask you a few questions.

Mr. LOESCH. Sure

Senator LEVIN. Perhaps your statement covers these, perhaps your comments would be brief with them. Do you think these meetings could be profitably opened up to the public or should they be closed?

Mr. LOESCH. Well, I hadn't thought of that question, but based on my experience, I would believe that it would be better if they were closed. It's my belief that many times opening negotiations to the public results in posturing and in being unable to back away from positions once taken even though logic might require it, so my predilection would be to keep the working meetings of the commission closed. I don't say it wouldn't be highly appropriate to have public meetings or hearings to receive other views, but I think the commission should be allowed to have private meetings if it should desire.

Senator LEVIN. I will have some additional questions for you after we are all done.

Senator BOSCHWITZ. I will wait, at least until Professor Murray speaks. I am interested in Mr. Loesch's testimony.

Senator LEVIN. Professor Murray?

STATEMENT OF FRANCIS X. MURRAY, DIRECTOR, NATIONAL COAL POLICY PROJECT

Mr. MURRAY. Thank you, Mr. Chairman.

It is a pleasure to be here before the committee. I have submitted testimony which I will not read, but I would like to highlight some points from it because I think they are of interest to the committee and will be helpful.

Senator LEVIN. If there are no objections, your entire testimony will be made a part of the record at this point and we thank you for highlighting it.

[The prepared statement of Mr. Murray follows:]

STATEMENT BY FRANCIS X. MURRAY
DIRECTOR, NATIONAL COAL POLICY PROJECT
BEFORE SENATE SMALL BUSINESS COMMITTEE

JULY 29, 1980

I AM FRANCIS X. MURRAY, A MEMBER OF THE GRADUATE FACULTY OF GEORGETOWN UNIVERSITY, AND A PROFESSOR IN THE SCHOOL OF FOREIGN SERVICE. I AM ALSO THE DIRECTOR OF NATIONAL ENERGY PROGRAMS AT THE CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, A POLICY RESEARCH CENTER AFFILIATED WITH GEORGETOWN UNIVERSITY. IN THIS LATTER CAPACITY, FOR THE PAST FOUR YEARS, I HAVE HAD THE UNIQUE AND FASCINATING EXPERIENCE TO BE THE DIRECTOR OF THE NATIONAL COAL POLICY PROJECT. IT IS INDEED A PLEASURE TO APPEAR BEFORE THE SENATE SELECT COMMITTEE ON SMALL BUSINESS, AND THE GOVERNMENTAL AFFAIRS SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT TO RELATE SOME OF MY EXPERIENCES WITH THE NCPP WHICH I BELIEVE WILL BE OF INTEREST TO THE COMMITTEE AND THE SUBCOMMITTEE.

TODAY I WOULD LIKE TO PRESENT A BRIEF OVERVIEW OF THE PROJECT DESCRIBING WHAT IT IS, AND SOME OF THE KEY FACTORS WHICH ACCOUNT FOR ITS SUCCESS. THEN I WOULD LIKE TO BRIEFLY LOOK AT SOME OF THE DIFFERENT TYPES OF SOLUTIONS DEVELOPED BY THE PROJECT PARTICIPANTS AND GIVE SOME INSIGHTS INTO WHY THE PARTICIPANTS FEEL THAT THEY WERE REASONABLE AND WORKABLE. FINALLY, I WOULD LIKE TO OFFER SOME THOUGHTS REGARDING THE APPLICABILITY OF PROCESSES SIMILAR TO THAT USED BY THE NCPP FOR THE RESOLUTION OF REGULATORY DISPUTES.

THE NATIONAL COAL POLICY PROJECT FORMALLY BEGAN IN JANUARY 1977. THE OBJECTIVE WAS TO BRING TOGETHER LEADERS FROM INDUSTRY AND THE ENVIRONMENTAL COMMUNITY TO SEEK CONSENSUS ON THE KEY ISSUES SURROUNDING THE USE OF COAL IN AN ECONOMICALLY AND ENVIRONMENTALLY ACCEPTABLE MANNER. DURING ITS MORE THAN THREE YEARS OF ACTIVITY, APPROXIMATELY 150 INDIVIDUALS FROM THESE TWO SIDES PARTICIPATED IN MORE THAN 50 TASK FORCE MEETINGS, EXPENDED MORE THAN 10,000 MAN-DAYS OF EFFORT, AND WERE ABLE TO REACH AGREEMENT ON MORE THAN 200 ISSUES RELATED TO THE PRODUCTION AND USE OF COAL. THE INDIVIDUALS PARTICIPATING IN THIS EFFORT INCLUDED SUCH NOTABLES AS GERALD DECKER, VICE PRESIDENT, KAISER ALUMINUM; ED PHELPS, PRESIDENT, PEABODY COAL; AND J. ROBERT FERGUSON, EXECUTIVE VICE PRESIDENT, UNITED STATES STEEL; ON THE INDUSTRY SIDE. ON THE ENVIRONMENTAL SIDE WERE LEADERS SUCH AS LAURENCE I. MOSS AND MICHAEL MCCLOSKEY, PAST PRESIDENT AND EX-DIRECTOR OF THE SIERRA CLUB, RESPECTIVELY; AND BRUCE TERRIS, A LEADING ENVIRONMENTAL ATTORNEY.

THE FUNDING FOR THIS PROJECT WAS OBTAINED FROM FOUNDATIONS (E.G. FORD FOUNDATION AND A. W. MELLON FOUNDATION), MODEST GRANTS FROM GOVERNMENT AGENCIES (E.G. EPA, DOE), AND FROM CORPORATE DONATIONS. IN ORDER TO AVOID BOTH THE APPEARANCE AND THE REALITY OF CONFLICT OF INTEREST, ALL ENVIRONMENTAL EXPENSES WERE PAID WITH FOUNDATION AND GOVERNMENTAL GRANTMONIES. (A LIST OF SPONSORING ORGANIZATIONS IS ATTACHED IN THE APPENDIX.)

IN CONSIDERING THE SUCCESS OF THE NATIONAL COAL POLICY PROJECT, ONE QUESTION IMMEDIATELY COMES TO MIND--"WHY WERE THESE PEOPLE WILLING TO PARTICIPATE IN THIS UNPRECEDENTED AND OBVIOUSLY RISKY VENTURE WHICH HELD FEW GUARANTEES OF SUCCESS?" WHILE THERE WERE MANY

PERSONAL CONSIDERATIONS THAT COULD BE CITED, I BELIEVE ONE BASIC UNDERLYING FACTOR CLEARLY STANDS OUT; THAT IS, NEITHER SIDE WAS SATISFIED WITH THE EXISTING SYSTEM OF RESOLVING THEIR DISPUTES.

THIS WAS A STARTLING REVELATION, FOR EACH SIDE HAD ASSUMED THAT THE SYSTEM WAS WORKING TO THE ADVANTAGE OF THE OTHER. IN FACT, BOTH SIDES FOUND THE EXISTING SYSTEM MORE OFTEN THAN NOT TO BE TIME-CONSUMING, EXPENSIVE, AND UNPREDICTABLE. APPARENT VICTORIES OFTEN TURNED OUT TO BE HOLLOW AS THE CONFRONTATION WAS MOVED FROM ONE ARENA TO ANOTHER, E.G., FROM THE REGULATORY HEARINGS TO THE COURTS.

AS THE REALIZATION GREW THAT BOTH SIDES FELT THE ADVERSARY SYSTEM WAS OFTEN INEFFECTIVE, MORE AND MORE INDIVIDUALS WERE WILLING TO LOOK FOR ALTERNATIVE PROCESSES FOR RESOLVING AT LEAST SOME OF THEIR DIFFERENCES. AS JOHN CORCORAN, CO-CHAIRMAN OF THE MINING TASK FORCE AND FORMER CHIEF EXECUTIVE OFFICER OF CONSOLIDATION COAL STATED:

> "WE HAD BEATEN EACH OTHERS' BRAINS OUT LONG ENOUGH. IT WAS TIME WE TRIED SOMETHING DIFFERENT, A MORE CONSTRUCTIVE WAY OF RESOLVING SOME OF OUR APPARENT DIFFERENCES."

ONE OF THE DIFFICULTIES FACING INDIVIDUALS OR GROUPS WHO MIGHT CHOOSE TO EXPLORE COMMON GROUND OR A NEGOTIATED SOLUTION OF THEIR DIFFERENCES IS THAT THEIR OPPORTUNITIES TO MEET ARE USUALLY LIMITED TO THE FORMAL ADVERSARIAL SETTING. THIS ADVERSARIAL RELATIONSHIP DOMINATES THE LEGISLATIVE, REGULATORY AND COURT PROCESSES. BY ITS NATURE, THE ADVERSARY SYSTEM FORCES EACH SIDE TO PRESENT ITS CASE MOST FORCEFULLY; AT THE SAME TIME, THE OPPONENTS' POSITION IS

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PRESENTED IN THE MOST NEGATIVE OF TERMS. SUCH POSITIONS LEAVE LITTLE ROOM FOR NEGOTIATION OR FOR EFFECTIVELY ASCERTAINING WHERE COMMON GROUND MAY EXIST. THIS WAS EXPRESSED BY MICHAEL MCCLOSKEY, EXECUTIVE DIRECTOR OF THE SIERRA CLUB, AND CO-CHAIRMAN OF THE MINING TASK FORCE OF THE NCPP IN DESCRIBING SOME OF THE PITFALLS OF THE ADVERSARY SYSTEM:

> "...BOTH SIDES HAVE TENDED TO ASSUME THAT THE ISSUES HAVE ALL BEEN NON-NEGOTIABLE: INDUSTRY HAD TENDED TO ASSUME THAT ENVIRONMENTALISTS OPPOSE EVERYTHING, WHILE ENVIRONMENTALISTS HAVE TENDED TO ASSUME THAT INDUSTRY WILL NEVER MAKE ANY REAL CONCESSIONS. WITH THESE ATTITUDES MANY DISPUTES INSTANTLY BECOME IDEOLOGICAL.
>
> " THIS IS UNFORTUNATE BECAUSE MANY ENVIRONMENTAL DISPUTES INVOLVE PRACTICAL DIFFERENCES WHICH ARE RESOLVABLE. MY OWN EXPERIENCE SUGGESTS THAT HALF OR MORE OF ALL DISPUTES OVER SITE-SPECIFIC CONSTRUCTION PROJECTS REALLY INVOLVE ONLY THE LIMITED AIM OF GAINING MITIGATION.
>
> " THE POLEMICS OF THE DISPUTE, HOWEVER, MAKE IT DIFFICULT FOR THE PARTIES TO REVEAL THEIR ULTIMATE AIMS AND THEIR FINAL "BOTTOM-LINE" IN ANY SETTLEMENT. THUS IT IS EASY FOR THE TWO SIDES TO ENTIRELY MISREAD EACH OTHER'S MOTIVES AND INTENTIONS."

WHILE WE DO NOT SUGGEST THAT THE ADVERSARY PROCESS, WHICH IS FUNDAMENTAL TO OUR SYSTEM OF LAW AND GOVERNMENT, SHOULD BE ABOLISHED, WE DO BELIEVE THAT IT SHOULD NOT BE VIEWED AS THE ONLY METHOD OF RESOLVING ENVIRONMENTAL OR OTHER PUBLIC INTEREST DISPUTES. OTHER APPROACHES MAY OFTEN BE MORE EFFECTIVE IN IDENTIFYING AREAS OF COMMON AGREEMENT. OUR PLEA IS THAT OTHER PROCESSES AND METHODS SHOULD BE TRIED AND THAT THE ADVERSARIAL APPROACH BE SAVED FOR THOSE ISSUES OF DEEPLY-HELD CONVICTION.

IN THIS SPIRIT, THE NCPP ASKED THE PARTIES TO STEP ASIDE FROM THEIR NORMAL ADVERSARIAL POSTURE AND CONSIDER THEIR APPARENT DIFFERENCES IN A CANDID, PROBLEM SOLVING ATMOSPHERE. THE METHODOLOGY

WHICH WE ADOPTED IS CALLED THE "RULE OF REASON." THE "RULE OF REASON" CALLS FOR OPEN DISCUSSION OF THE ISSUES, DEVOID OF POSTURING OR DELIBERATELY MISLEADING ONE'S OPPONENT, IT REQUIRES THE SHARING OF ALL INFORMATION, AND ENCOURAGES THE PARTICIPANTS TO SEEK TO RESOLVE THEIR DIFFERENCES IN GOOD FAITH. THIS SOUNDS VERY IDEALISTIC, NEVERTHELESS, AFTER A LIMITED PERIOD OF TRIAL, BOTH SIDES BEGAN TO APPRECIATE THE PRACTICAL MERITS OF THE PROCESS. IN CANDIDLY STATING THEIR POSITIONS, IT BECAME POSSIBLE TO CLEARLY IDENTIFY THOSE AREAS SUSCEPTIBLE TO NEGOTIATION AND CREATIVE PROBLEM SOLVING, AND PROGRESS WAS ALLOWED TO ENSUE.

THIS PROGRESS IS EVIDENCED BY THE AGREEMENTS WHICH THE TWO SIDES WERE ABLE TO REACH. IN A GENERAL SENSE THE AGREEMENTS WERE OF THREE BASIC TYPES. THE FIRST TYPE OF AGREEMENT REPRESENTS THE CLARIFICATION OF POSITIONS; THE SECOND, TRUE GIVE AND TAKE NEGOTIATION; AND THE THIRD CAN BEST BE DESCRIBED AS CREATIVE PROBLEM SOLVING.

LOOKING MORE CLOSELY AT THESE GENERAL TYPES OF AGREEMENTS, WE FIND THAT THE FIRST CATEGORY CAN BE DESCRIBED AS RESOLUTIONS OF SEMANTIC DIFFERENCES. HERE THE PROJECT PARTICIPANTS DISCOVERED THAT ON SOME ISSUES THEIR DIFFERENCES WERE MORE ATTRIBUTABLE TO THE IMPRECISION OF LANGUAGE AND THE MISUNDERSTANDING OF THEIR POSITION VIS-A-VIS THE OTHER SIDE. WHEN CAREFULLY ARTICULATING THEIR UNDERLYING POSITION WITHOUT POSTURING OR PLAYING TO AN AUDIENCE, THEY DISCOVERED THAT THEIR APPARENT DIFFERENCES OFTEN DISAPPEARED.

THE SECOND CATEGORY OF AGREEMENT CONSISTS OF NEGOTIATED SETTLEMENTS. IN SUCH CASES, THE TWO SIDES UNDERSTOOD EACH OTHERS' POSITION;

BUT NEITHER SIDE WAS WILLING TO MOVE WITHOUT SOME INCENTIVE OR QUID PRO QUO. IN FULLY UNDERSTANDING THE OTHER SIDE'S CRITICAL INTERESTS, ONE IS BETTER ABLE TO REACH A SOLUTION WHICH INCORPORATES THE VITAL INTERESTS OF BOTH SIDES AND MOVES THE DEBATE OFF DEAD-CENTER. AN EXAMPLE OF THIS TYPE OF AGREEMENT CAN BE ILLUSTRATED BY THE RECOMMENDATIONS OF THE AIR POLLUTION TASK FORCE FOR AN EXPEDITED POWER PLANT SITING PROCEDURE.

AS A MATTER OF TACTICS, ENVIRONMENTALISTS HAD OFTEN OPPOSED THE SITING OF NEW POWER PLANTS, INTERVENING AT EVERY STEP OF THE PERMITTING PROCESS. IN MANY CASES, THIS OPPOSITION WAS BROUGHT ABOUT BY THE FEELING ON THE PART OF ENVIRONMENTAL GROUPS THAT THEY WERE UNABLE TO EFFECTIVELY PARTICIPATE IN THE PLANNING AND SITING PROCESSES, THAT THEY WERE "OUTGUNNED" BY THE NUMBER OF INDUSTRY EXPERTS. THEREFORE, THEY USED "GUERILLA WARFARE," THAT IS, DELAYING TACTICS AS A METHOD TO BUY TIME UNTIL THEIR SPECIFIC OBJECTIONS HAD BEEN CONSIDERED. FROM THE INDUSTRIAL PERSPECTIVE, THESE DELAYS WERE INTERMINABLE AND EXTREMELY COSTLY. THE NEGOTIATED POSITION DEVELOPED IN THE NCPP RECOMMENDATION WAS TO EXPEDITE THE SITING PROCESS, CONTINGENT UPON THE AVAILABILITY OF RESOURCES TO PROVIDE FOR EFFECTIVE PUBLIC INTEREST PARTICIPATION IN THE POWER PLANT SITING AND PLANNING PROCESS. (THIS POSITION WAS OF SIGNIFICANT INTEREST TO CONGRESS AND HAS BEEN INCORPORATED IN H.R. 7464, WHICH IS CURRENTLY BEING CONSIDERED BY THE HOUSE.)

THE THIRD CATEGORY OF AGREEMENT ARISES WHEN THE PARTIES REACH A NEW POSITION WHICH NEITHER HAD ESPOUSED BEFORE THE NEGOTIATION, REFLECTING A SOLUTION THAT BOTH SIDES BELIEVE IS SUPERIOR TO THEIR

ORIGINAL POSITION. A GOOD EXAMPLE OF THIS TYPE OF AGREEMENT IS THE INCENTIVES FORMULA TO ENCOURAGE THE DEVELOPMENT OF NEW POLLUTION CONTROL TECHNOLOGY. THIS OPPORTUNITY WAS PROVIDED BY THE LACK OF INCENTIVES FOR NEW TECHNOLOGY WHICH IS INHERENT IN THE CURRENT CLEAN AIR REGULATIONS. IN FACT, THE CURRENT REGULATIONS APPEARED TO INTERPRET THE LAW IN A MANNER SUCH THAT THE RISKS OF FAILURE, SHOULD THE NEW TECHNOLOGY NOT PERFORM AS EXPECTED, DISCOURAGED ANY COMPANY FROM GAMBLING ON NEW CONTROL TECHNOLOGIES. THE PENALTIES INVOLVED WERE BOTH ECONOMIC AND LEGAL; FACED WITH SUCH POSSIBILITIES, FEW COMPANIES WERE LIKELY TO TRY TRULY INNOVATIVE EMISSION CONTROL SYSTEMS. BUT, BOTH SIDES REALIZED THAT IT WAS IN THEIR COMMON INTEREST THAT NEW TECHNOLOGY BE BROUGHT ALONG. BRUCE TERRIS, CO-CHAIRMAN OF THE AIR POLLUTION TASK FORCE, DESCRIBED THE COMMON GROUND WHICH BOTH SIDES DISCOVERED:

> " INDUSTRY WANTS LESS EXPENSIVE CONTROLS; ENVIRONMENTALISTS WANT BETTER CONTROLS. PUT THESE CONCEPTS TOGETHER AND YOU HAVE COST EFFECTIVE POLLUTION CONTROL. IN THE LONG RUN EVERYONE STOOD TO GAIN."

WORKING TOWARD THIS COMMON GOAL, THE AIR POLLUTION TASK FORCE WAS ABLE TO CONSTRUCT A METHOD OF PROVIDING INCENTIVES TO DEVELOP LESS EXPENSIVE AND/OR BETTER CONTROL TECHNOLOGY (THE RECOMMENDATION IS PRESENTLY INCLUDED IN H.R. 7465.)

TO SUM IT ALL UP, THE "BOTTOM-LINE" OF THE NCPP IS THAT BOTH SIDES FOUND THAT THEY COULD OFTEN AGREE ON RECOMMENDATIONS WHICH BOTH MET THE ENVIRONMENTAL OBJECTIVES OF REGULATION, AND YET PERMITTED INDUSTRY TO FUNCTION ECONOMICALLY AND EFFECTIVELY. IN CASES WHERE THESE JOINT AIMS CAN BE MET, EVERYONE IS AHEAD IF POSITIVE SOLUTIONS ARE IDENTIFIED.

IN STUDYING THE PROJECT AND ITS ACCOMPLISHMENTS, MANY PEOPLE IN GOVERNMENT AND THE ACADEMIC COMMUNITY HAVE BEEN QUICK TO RECOGNIZE THE POTENTIAL OF SUCH A PROCESS. IN THE REPORT OF THE ENERGY PROJECT OF THE HARVARD BUSINESS SCHOOL ENTITLED, ENERGY FUTURE, STOBAUGH AND YERGIN MADE THE FOLLOWING OBSERVATION:

> "IN THE NATIONAL COAL POLICY PROJECT, THEY [INDUSTRY AND THE ENVIRONMENTALISTS] CAME TOGETHER IN A COOPERATIVE EFFORT TO REACH CONSENSUS, PROVIDE GUIDANCE FOR THE RESOLUTION OF NATIONAL COAL POLICY ISSUES AND TO ARTICULATE THEIR DIFFERENCES IN A USEFUL WAY.
>
> " THE PROJECT WAS ATTACKED BY SOME ENVIRONMENTALISTS, BY SOME MEMBERS OF INDUSTRY, AND EVEN BY SOME PERSONS WITH THE GOVERNMENT, BUT WHAT WAS SIGNIFICANTLY IMPORTANT WAS THAT A POTENTIALLY NEW COOPERATIVE PROCESS WAS SET IN MOTION. SUCH AN EFFORT MIGHT BEGIN TO REPLACE THE WORN DEBILITATING RHETORIC OF CONFLICT WITH SENSIBLE COMPROMISE AND A SUCCESSFUL RESOLUTION OF DIFFICULT ISSUES."

PERHAPS WE CAN LEARN SOME LESSONS FROM OUR JAPANESE ALLIES WHO SEEM TO HAVE DONE QUITE WELL IN DEALING WITH MANY OF THEIR ENVIRONMENTAL PROBLEMS. THE PROCESS THEY USE IN DEVELOPING SUCH LAWS AND REGULATIONS IS BASICALLY ONE OF CONSENSUS AND COOPERATION RATHER THAN AN ADVERSARY APPROACH. A CURSORY LOOK AT THE JAPANESE AND U.S. EXPERIENCE WOULD INDICATE THAT THE JAPANESE HAVE MADE MORE PROGRESS MORE QUICKLY THAN HAS THE U.S. IN ACHIEVING ENVIRONMENTAL IMPROVEMENTS.

I AM NOT SUGGESTING THAT WE ADOPT THE JAPANESE MODEL WHERE ENVIRONMENTALIST AND OTHER PUBLIC INTEREST CONCERNS DO NOT APPEAR TO BE AS STRONGLY REPRESENTED IN THE POLITICAL PROCESS AS IN THE U.S.

CLEARLY THERE ARE DIFFERENCES IN CUSTOMS, ATTITUDES AND TRADITIONS WHICH HAVE SHAPED OUR TWO DIFFERENT SOCIETIES. HOWEVER, AS A NATION WHICH PRIDES ITSELF ON INNOVATION AND ADAPTATION, WE MIGHT GAIN SOME USEFUL INSIGHTS FROM THEIR EXPERIENCE. OUR ENERGY AND ENVIRONMENTAL PROBLEMS WOULD SEEM TO CRY OUT FOR MORE COOPERATIVE APPROACHES AND A NEED FOR A SENSE OF NATIONAL CONSENSUS. OUR ADVERSARY SYSTEM SEEMS POORLY SUITED TO ENGENDER MORE CONSTRUCTIVE ATTITUDES.

THE USE OF PROCESSES SUCH AS THAT EMPLOYED BY THE NCPP TO PROVIDE EFFECTIVE INPUT INTO THE DEVELOPMENT OF REGULATIONS IS AN INNOVATIVE AND AN IMPORTANT STEP. INCREASINGLY, REGULATORY AGENCIES HAVE BEEN SUBJECT TO CRITICISM FROM NEARLY ALL QUARTERS. WHILE EXPECTED, AND IN SOME CASES EARNED, WE MUST REALIZE THAT THIS UNSATISFACTORY PERFORMANCE HAS COME ABOUT DESPITE THE EFFORTS OF THOUSANDS OF DEDICATED, SINCERE AND COMPETENT INDIVIDUALS IN THE REGULATORY AGENCIES. THIS SHOULD BE A SOBERING MESSAGE FOR IT IMPLIES THAT MOST OF US IN THE SAME SYSTEM WOULD MOST LIKELY PRODUCE SIMILAR RESULTS. THE HAUNTING QUESTION IS--WHY?

I BELIEVE THAT A PART OF THE ANSWER LIES IN THE FACT THAT THOSE MOST AFFECTED BY THE REGULATIONS USUALLY DO NOT <u>EFFECTIVELY</u> PARTICIPATE IN THEIR FORMULATION. I EMPHASIZE "EFFECTIVELY" BECAUSE IN A PRO FORMA SENSE, THEY DO PARTICIPATE, BUT THIS PARTICIPATION IS QUITE OFTEN MORE SUPERFICIAL THAN NOT. RECALLING SOME OF THE REMARKS MADE BY MR. MCCLOSKEY CONCERNING THE ADVERSARY PROCESS, NAMELY THAT "...THE POLEMICS OF THE DISPUTE MAKE IT DIFFICULT FOR THE PARTIES TO REVEAL THEIR ULTIMATE AIMS," ONE CAN BEGIN TO UNDERSTAND THE DIFFICULTIES WHICH THE REGULATORY AGENCY FACES.

The proposed regulatory negotiating process being considered by this committee could provide the opportunity to discuss and reveal those ultimate aims.

As our resources become scarcer, it seems obvious that the traditional adversary approach will only intensify the "must win" attitude of many parties. To the extent that we can avoid rigidifying already inflexible positions, we should use every means available to do so. By promoting dialogue between the primary parties in interest, by fostering communication between the regulators and those that are regulated, by attacking the problem at its roots, I believe that there is a good possibility that the regulation issuing process can be improved and, accordingly, the related costs can be reduced.

An important concern is what results might be produced by regulatory negotiation. Of course there is no guarantee that sitting down together in good faith with one's adversaries will bring about a complete resolution of all differences. There is, however, indisputably a better chance of solving our problems than if no effort is made at all.

The types of possible results are varied. At least that much is clear from my experience with the NCPP. The most useful product would be consensus on how certain regulations should be written, to the extent that is consistent with the agency's mandate. Even in the absence of such dramatic success, other significant contributions can be made by employing such an approach. The first such "other" benefit lies in making the regulators aware of the underlying concerns of the parties. Another important contribution would be

MAKING THE PARTIES MORE AWARE OF WHAT IS IMPORTANT TO EACH OTHER, THUS NARROWING THE AREAS OF DISPUTE. FINALLY, AND PERHAPS MOST SIGNIFICANTLY, THE PARTICIPANTS IN SUCH A PROCESS WOULD HAVE THE OPPORTUNITY TO DEVELOP A TRUST AND UNDERSTANDING FOR EACH OTHER.

IN FOCUSING ON THE COMMITTEE'S PROPOSAL, THERE ARE TWO KEY AREAS OF CONCERN WHICH I WOULD LIKE TO ADDRESS. FIRST, IT IS NOT CLEAR THAT INDIVIDUALS FROM SMALL BUSINESSES CAN EASILY PARTICIPATE IN SUCH AN UNDERTAKING. TRADITIONALLY SMALL BUSINESSPERSONS BECAUSE OF LIMITED STAFF, THE SEVERE TIME DEMANDS PLACE UPON THEM, AND THE BROAD RANGE OF THEIR RESPONSIBILITIES ARE FORCED TO DEAL WITH REGULATIONS AFTER THE FACT, RATHER THAN PARTICIPATING IN THEIR DEVELOPMENT. THEREFORE, IT IS HIGHLY PROBLEMATICAL THAT THE SMALL BUSINESS EXECUTIVE COULD EFFECTIVELY PARTICIPATE IN THE REGULATORY NEGOTIATING PROCESS UNLESS SOME SPECIAL EFFORT IS MADE TO ACTIVELY SOLICIT SUCH PARTICIPATION. PERHAPS THIS COMMITTEE OR THE SMALL BUSINESS ADMINISTRATION COULD HELP TO REMEDY THIS PROBLEM.

THE SECOND PROBLEM CONCERNING REGULATORY NEGOTIATION IS THE SELECTION OF PARTICIPANTS FOR THE NEGOTIATING PROCESS.

IF THE REGULATORY COMMISSION APPROACH IS TO BE SUCCESSFUL, THEN BASED ON OUR EXPERIENCE, PARTICIPATION SHOULD BE LIMITED TO THOSE WITH DIRECT AND VITAL INTERESTS IN THE OUTCOME. THIS WOULD INCLUDE THOSE VITALLY CONCERNED WITH THE OBJECTIVES OF THE LAW OR REGULATION, E.G., ENVIRONMENTAL GROUPS, AS WELL AS THOSE DIRECTLY AFFECTED BY THE SPECIFIC RULES, GUIDELINES, AND INSTRUCTIONS DESIGNED TO ACHIEVE SUCH OBJECTIVES, E.G., INDUSTRY OR LABOR. WITH THIS IN MIND, IT SHOULD BE REMEMBERED THAT THE APPROPRIATE PARTICIPANTS WILL CHANGE

DEPENDING UPON THE ISSUE BEING CONSIDERED. IT IS ALSO IMPORTANT THAT THE NEGOTIATING COMMISSION BE LIMITED IN SIZE SO THAT IT CAN EFFECTIVELY ENGAGE IN A NEGOTIATING PROCESS. THERE IS NO MAGIC NUMBER, BUT CLEARLY A LARGE GROUP WITH INTEREST VARYING FROM CASUAL TO CRITICAL IS NOT LIKELY TO MEET WITH SUCCESS. LIMITING PARTICIPATION MAY BE IMPOSSIBLE FOR A GOVERNMENT AGENCY. IF THIS SHOULD BE THE CASE, THEN I BELIEVE IT WOULD BE MORE DESIRABLE TO MOVE SUCH ACTIVITIES TO PRIVATE INSTITUTIONS ACCEPTABLE TO THE PARTIES AT ISSUE. UNLIMITED PARTICIPATION WOULD SIMPLY DUPLICATE THE EXISTING FORMAL PROCESS AND SEEMINGLY HAVE LITTLE LIKELIHOOD OF REAL SUCCESS.

I RECOGNIZE THAT THIS MAY NOT BE A POPULAR POSITION, HOWEVER, IF THE PROCESS IS TO WORK, THEN SOME CONSIDERATION MUST BE GIVEN TO LIMITING PARTICIPATION TO THOSE VITALLY CONCERNED WITH THE OUTCOME. TODAY WHEN THERE IS A WIDESPREAD FEELING THAT PEOPLE DO NOT HAVE AN EFFECTIVE SAY IN THE DECISIONS WHICH AFFECT THEM, A POSITION SUCH AS I HAVE ESPOUSED MUST SEEM TO BE HERESY. HOWEVER, I BELIEVE THE COMPLAINT REGARDING THE LACK OF EFFECTIVE PARTICIPATION SHOULD BE READ AS EMPHASIZING EFFECTIVE AND GOES WELL BEYOND SIMPLY HAVING A FORUM IN WHICH TO MAKES ONE'S SPEECH.

AS THE PROPOSED REGULATORY NEGOTIATING PROCESS WOULD BE ADVISORY IN NATURE, THE FORMAL REGULATORY PROCEDURES WOULD STILL PROVIDE THE OPPORTUNITY FOR ALL TO BE HEARD. IF THE APPROACH IS SUCCESSFUL, THE RESULTS WHICH ARE PRODUCED WILL BE QUITE DIFFERENT FROM NORMAL ADVERSARIAL POSITIONS. RECOGNIZING THIS, CONGRESSMAN PEASE, AUTHOR OF H.R. 7464 AND H.R. 7465, THE TWO BILLS BASED ON NCPP RECOMMENDATIONS, ALERTED HIS COLLEAGUES IN THE HOUSE:

> "I AM SURE THAT ENVIRONMENTAL GROUPS AND INDUSTRIALISTS READING THESE BILLS FOR THE FIRST TIME WILL FIND MANY FEATURES THAT WILL PLEASE THEM. ON THE OTHER HAND, THEY ARE ALMOST CERTAIN TO FIND ELEMENTS THAT THEY WILL DISAGREE WITH. THIS IS TO BE EXPECTED SINCE THESE BILLS INCLUDE COMPROMISE POSITIONS AGREED TO BY KEY LEADERS FROM BOTH SIDES."

SUCH DIFFERENCES ARE TO BE EXPECTED AS THEY ARE PROOF OF THE SUCCESS OF A NEGOTIATING PROCESS.

THE WORTH OF SUCH PROCESSES HAS ALSO BEEN RECOGNIZED BY THOSE WHO ARE RESPONSIBLE FOR FORMULATING AND ADMINISTERING REGULATIONS. IN THIS REGARD, DOUGLAS COSTLE, ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY STATED:

> " THE GOVERNMENT SHOULD BE WELL SERVED BY THE RECOMMENDATIONS OF THE NATIONAL COAL POLICY PROJECT AND, HOPEFULLY, OTHER INSTITUTIONS WILL EXPLORE OPPORTUNITIES FOR SIMILAR APPROACHES TO SOLVING ENVIRONMENTAL CHALLENGES."

WE BELIEVE THAT THE COURSE OF ACTION PROPOSED BY THE COMMITTEE WILL PROVIDE SUCH AN OPPORTUNITY.

IF WE AT THE NATIONAL COAL POLICY PROJECT CAN BE OF SERVICE TO THE COMMITTEE IN THIS ENDEAVOR, PLEASE FEEL FREE TO CALL UPON US. WE WILL BE HAPPY TO HELP IN ANY WAY THAT WE ARE ABLE.

THANK YOU.

Appendix

Foundations, government agencies and industrial companies that contributed to the support of the project during its first phase are listed below:

Foundations:

Rockefeller Foundation
Sarah Scaife Foundation
Ford Foundation
Andrew W. Mellon Foundation
The William and Flora Hewlett Foundation (Phase II)

Government:

U.S. Energy Research & Development Administration
U.S. Department of Interior
U.S. Environmental Protection Agency
Tennessee Valley Authority
U.S. Department of Energy (Phase II)

Industry:

Air Products and Chemicals
Allied Chemical
Allis-Chalmers Corporation
American Electric Power Service Corporation
American Telephone and Telegraph
Atlantic Richfield Company
Baltimore Gas & Electric Company
BASF Wyandotte Corporation
Bethlehem Steel Corporation
CF&I Steel Corporation
Carolina Power & Light Company
Caterpiller Tractor Company
Celanese Corporation
Central Illinois Light Company
City of Colorado Springs (Dept. of Public Utilities)
Columbus & Southern Ohio Electric Company
Commonwealth Edison
Consumers Power Company
Corning Glass Works
Dayton Power & Light Company
Detroit Edison
The Dow Chemical Company
E.I. duPont de Nemours & Company
Esmark, Inc.
General Public Utilities Corporation
The BFGoodrich Company
Hercules Incorporated
Interlake, Inc.
Joy Manufacturing Company
Kaiser Steel Corporation
Minnesota Power & Light Company
Monsanto Company
Montana-Dakota Utilities Company
Nevada Power Company
New York State Electric & Gas Corporation
Niagara Mohawk Power Corporation
Ohio Edison Company
Olin Corporation
PPG Industries, Inc.
Pennsylvania Power & Light Company
Philadelphia Electric Company
Potomac Electric Power Company
Public Service Electric & Gas Company
Public Service Indiana
Republic Steel Corporation
Rohm and Haas Company
Sharon Steel Corporation
Southern Pacific Company
Stauffer Chemical Company
SUNOCO Energy Development Company
Tampa Electric Company
Texas Utilities Services, Inc.
The Toledo Edison Company
Union Carbide Corporation
Union Electric Company
United States Steel Corporation
Virginia Electric & Power Company
Wisconsin Electric Power Company
Wisconsin Public Service Corporation

pages tightly bound

Mr. MURRAY. The National Coal Policy Project began in 1977, involved some eight task forces, and approximately 150 individuals, reasonably divided half and half between the environmental and industry points of view. There were some 50 task force meetings and more than 10,000 man days of effort expended, including, eight field trips.

Senator BOSCHWITZ. Pardon me for interrupting.

What kind of Government representation was there?

Mr. MURRAY. There were Government observers and advisors but they were not formal participants in the proceedings or the task force meetings.

By that I mean that they could attend if they chose to do so. They could participate in the discussions, but when it came time to vote on an issue or to decide the recommendations of the group, they were not considered to be voting members.

The participants involved in this effort were recognized as leaders by their peers. There were among them opinion molders within the particular constituencies and leading technical experts. Not all of those who were asked to participate did so, by the way, for a variety of reasons.

Some who chose not to participate felt either that it would not be successful and, therefore, would not be worth their time and effort. Others felt that the adversary system is the only way to settle disputes, and, accordingly, chose not to attend. But, I think that those who did participate found it a very rewarding and worthwhile experience.

In the beginning we tried to set up the project as being something different from the normal adversary process. As Mr. Loesch mentioned, we used something called the rule of reason. This was a set of tenets or precepts whereby the parties agreed to argue and debate their positions on their merits; they agreed to share all data and information that would shed light on a particular issue at hand; where they agreed not to mislead or delay for its own sake; they agreed not to impugn the motives of each other, lightly. If they did so, they were to be very serious about it. And, above all, integrity was to be given top priority.

These ground rules were important because, through them we attempted to establish a level of expectations both as to the behavior that was expected of the individual and as to what he or she could expect from individuals on the other side. It was to indicate that this project was to be different from their normal adversarial contacts. And, I think these basic ground rules were successful in creating the necessary atmosphere.

The basic approach in using the rule of reason was to agree on the issues or the problems to be studied, seek agreement on the facts that could best describe and define those issues, then from those facts see if the parties could agree on any conclusions, and finally, if we could get that far, determine the recommendations which could logically and validly be drawn from those facts and conclusions.

It was a problem solving atmosphere that was created and one that, in many cases, was successful. I think this is quite different from the adversarial process where people tend to come together, present their own case in the best light, and try to present their

adversary's position in the worst light, and thereby, try to carry the day for their position.

I think, both sides would describe the recommendations which the project produced as being reasonable and workable. Neither side, perhaps, would say that they fulfilled their druthers. And, each would find things that perhaps they didn't like. But basically, their critical interests were protected and, on balance, they were able to support the recommendations. The recommendations covered a broad range of issues from items that were proposed for legislation to regulation, rules, and implementing instructions, and in some cases broad policy guidelines as to how coal should be produced and used in an environmentally and economically acceptable manner. That was the basic objective of the project.

From our experience with this effort, I think certain things have become clear in terms of the conditions that should exist for a project such as ours to be successful. First, we found that the issues must be ready for decision. That is, the parties should see a need to resolve the problem, because if they do not, someone else will resolve it for them. There must be at least some time pressure to come to a solution or judgment. Second, I think we also found that it is important for both sides to feel that their status is reasonably equal in the negotiations. Neither side can be confident of victory in the event that the case is submitted to a third party for decision. Third, it is important that the issues be negotiable and not be matters of basic underlying principle or involve the critical interests of one side. Fourth, the individuals themselves who participate should be of sufficient stature and have sufficient self confidence that if the facts and the logic of the situation dictated, they will be willing to change their position and negotiate in a give-and-take manner. And, finally, I think, it is very important that the individuals involved have a vital interest or stake in the outcome so that they will negotiate honestly, toughly, and in good faith.

I think that all of these conditions were important to us and I suspect that they are fundamental to any regulatory negotiation process.

One of the other things that we discovered, quite surprisingly, both for myself and also for the parties at issue, was that neither side was particularly happy with the current way of doing things. The reason I say that we were surprised, is that initially both sides felt that the system was operating to the advantage of the other. They were somewhat surprised to learn that the "other side" neither was no happier with it than they were. They both felt that the existing system was unpredictable, expensive and time consuming and that often their apparent victories turned out to be hollow. These confrontations were then often changed to a different forum or conducted in a different setting in another attempt to achieve their ultimate goal.

In regard to the recommendation presently before the committee, I think the proposed regulatory negotiating process can provide the opportunity to improve the process by which regulations are developed. I think as our Nation's resources seemingly become more scarce, it is obvious that the traditional adversary approach will only intensify the must win attitudes of many of the parties involved in these disputes. To the extent that we can avoid rigidify-

ing these already inflexible positions, it's helpful to pursue all the means that are available to do so. By promoting dialog between the primary parties, by fostering communications both with the parties and with the regulators, and by attacking the problem closer to its roots, there is a good possibility that the regulatory process can be improved, and accordingly, the costs associated with regulations might be reduced.

Looking at the conditions for successful negotiations which I referred to before, and appplying these to the regulatory process, it would seem that the two are well matched. First, of all, in either putting together new regulations or revising existing regulations, the timing would seem to be right. Regulatory issues are usually very mature, decisions will be made and are pending, and certainly it behooves the parties to act expeditiously, if they can, to arrive at positions in order to advise the regulating agencies. In terms of the equal status of the parties, I think in such negotiations generally both parties would be on an equal footing and that neither would be overly confident of success. In terms of the negotiability of the issues, while the law itself is not negotiable, obviously the process or the procedures which would carry it out certainly seem to be appropriate for negotiation.

The final criteria is the involvement of individuals of stature and confidence, who are willing to enter into give and take negotiation and who have a vital interest in the outcome. This appears to be the one area in which I think the proposal may have difficulty. Basically there seem to be two areas of concern.

The first relates to small business, which is a prime consideration of this committee; it's not at all clear that the small businessman could easily avail him or her self of this process. The commitments and demands on time, and the broad scope of responsibilities and activities make it particularly difficult for the small business executive to set aside the time to engage in such activities. Some effort must be made to actively solicit the participation of small business leaders. I think this will be a difficult task, but I think it is one that can be overcome with active solicitation, perhaps by this committee or by the Small Business Administration.

Senator BOSCHWITZ. I agree with that point because I am a businessman and for the reasons you stated.

Mr. MURRAY. Thank you, Senator, for reinforcing what I consider to be an important point.

The second problem which I see is the need to limit participation in such negotiation activities, limited, first to the vital interests concerned, and also limited in size to a group that can effectively negotiate. I think it is clear that if there is a spectrum of interest ranging from casual to critical and if there is a large number of participants, then it is very unlikely that the group can move successfully in a negotiating sense. Limiting the size of the group appears to be counter to much of the comment we hear about more involvement and more participation in Government decision making. However, I think that public outcry is really directed to the perceived need for effective participation, and effective participation goes well beyond simply having a forum in which to present one's position. It means really being involved in the making of those decisions which vitally effect one's interests.

This past summer I had the interesting and rewarding experience to have an Asian student working with me as a researcher. In relation to the committee's proposal, we have been trying to compare the way that the Japanese implement regulations with the way we do it in this country. It's been a very enlightening study. It appears to be much easier to find out how the Japanese system works than it is to find out how ours does. But I think, more importantly, it appears from our cursory look that the Japanese, basically through a system of cooperation and consensus, have been able to make more progress in terms of actually improving the environment in Japan than we have in the United States.

Perhaps the most telling example was the fact that the Japanese laws and regulations regarding air pollution, are contained in a book about 1 inch thick whereas the U.S. laws and regulations would have trouble fitting on this table, that's how voluminous they are. I think the difference in the two systems is indicative of the different attitudes and approaches to laws and regulations. Now, I'm not suggesting that we adopt the Japanese system. Certainly there are basic, fundamental differences in our cultures, but I think that perhaps there are some lessons that might be learned from their experience.

In summary, I heartily endorse the recommendation and proposal of the committee to establish a regulatory negotiating commission. I think it can be an important step in making progress toward producing regulations that are more workable and more efficient.

Thank you, Mr. Chairman.

Senator LEVIN. Thank you, Professor Murray.

Senator Boschwitz, shall we go to the third witness at this time, depending on your schedule?

Mr. Moss?

Mr. Moss. Mr. Chairman, my statement is fairly brief and I was planning to read it. But, if you would prefer, I would be glad to summarize and highlight it.

Senator LEVIN. How long is it? How many pages?

Mr. Moss. It is about eight pages and I think it would take about 8 or 9 minutes to read.

Senator LEVIN. Eight pages?

Mr. Moss. Yes.

Senator LEVIN. If you can summarize along the way, it might be helpful. We need more time for questions. Without objection, we will make the entire statement a part of the record at this point.

Mr. Moss. I will be glad to summarize it then.

[The prepared statement of Mr. Moss follows:]

STATEMENT OF LAURENCE I. MOSS, CHAIRMAN, ENVIRONMENTAL CAUCUS, NATIONAL COAL POLICY PROJECT

I welcome the opportunity to join my colleagues from the National Coal Policy Project (NCPP) to give our individual views on the subject of regulatory negotiation. We hope that our experiences (including both successes and failures) in negotiating agreements across the broad spectrum of coal-related energy policy issues will be useful to you.

The draft resolution circulated (on July 3, 1980) by your committees for comment is carefully conceived and worthy of support. I will comment in detail on it in a moment. Before I do, however, I would like to set the context by noting how the scope of what is proposed by the committees compares with that of the coal project.

In the case of the coal project, any issue thought to be important by the participants, whether it affected the supply of, demand for, or impact arising from the use

of coal, was fair game for discussion. It is not surprising, then, that only a fraction of the issues considered by the project were at the stage in the decision-making process where "regulatory negotiation," as implicitly defined by your committees, would be useful.

One might conceive of at least five stages in the usual development of the governmental decision-making process. The first is conceptual, where a problem is identified and fundamentally different approaches to its solution are assessed. The second is legislative, where the focus usually narrows to one or a very few approaches as the legislation is fashioned. The third is regulatory, where an executive agency interprets the legislation in the process of promulgating specific rules and regulations. The fourth is validation, as aggrieved parties petition the courts to overturn the regulations and even the enabling legislation. The fifth is oversight, as legislative bodies (and others), after some time has passed, review the impact of the laws and regulations and propose changes they believe desirable. These changes might be in the nature of "fine tuning" on the one hand, or conceptual on the other, in which case the cycle returns to the first stage.

Negotiations can be useful in broadening the range of consensus in all of these stages. In the case of the coal project, which was comprised of people active in the environmental movement along with people from the coal mining, electric utility, steel, chemical, forest products, and other major industrial sectors, the negotiated agreements occurred on issues in various stages. We generally found, though, that it was particularly difficult to reach agreement on issues in the active legislative stage. In fact, in some of those cases, it was thought best not to try to develop a consensus until the legislation had been enacted, when the focus would of course shift to the regulatory stage.

The draft resolution, as I interpret it, would largely solve this problem by focusing exclusively on the regulatory stage, where, although success is by no means guaranteed, it is perhaps more likely. I am defining "success" here in terms both of reaching agreement among the negotiating parties and in having an immediate impact on the decision. Issues in the conceptual stage may be equally subject to negotiated agreement, but, since no decision is imminent, it takes much longer to measure success.

Drawing again from the experience of the coal project, it was most satisfying to us when the Federal Energy Regulatory Commission (FERC) adapted, both in principle and in detail, some of our recommendations on the pricing of standby power purchased by cogenerators from electric utilities and surplus power sold by cogenerators to utilities. In this case, as well as in the case of certain of our recommendations on reclamation of strip-mined land, the timing was right and the agencies receptive. It was apparent that the project was relevant to decisions taken in the "real world."

The other side of the coin in dealing with issues in the regulatory stage is that failures in implementation are also more immediately evident. Our draft recommendations on federal coal leasing policy were quickly rejected by the Bureau of Land Management. In this case, I believe, our timing was a singificant factor, since BLM had gone rather far in developing its own proposals. I will return to the question of timing in commenting on the draft resolution.

As one moves backwards in time from the regulatory stage, cause-and-effect relationship in the setting of policy are more difficult to establish. The coal project's recommendations that there be less economic regulation of energy markets in general and the transportation sector in particular is consistent with trends in the Administration and the Congress that have become most evident since the issuing of our initial recommendations, but it is typically not clear in such cases that any one individual or organization played a decisive role. The same might be said about our apparent failure to convince policymakers that it is unwise for government to subsidize commercialization (as distinct from research, development, and demonstration) of new centralized energy sources—such synfuels production facilities—because such subsidies would disguise the true cost of the replacement supplies and thus cause users to invest less than would be optimum in more efficient end-use technology. The net effect of the subsidies, we feel, is to make it more, not less, difficult to balance supplies of and demands for energy.

At yet another step removed is our recommendation to experiment with an innovative emission charge and rebate plan of our design in one or more air quality regions not now meeting ambient standards. Even if we are successful with this proposal, as I hope we will be, it will be quite some time before the trial can be arranged and the results compared with more traditional regulatory schemes.

I have gone into these examples at some length because I see a paradox to which I would like to draw the committees' attention: By focusing on the regulatory stage, one is perhaps most assured of impact, or at least of prompt consideration and a

timely decision. But the penalty for so doing is that some of the most important questions and attractive alternatives may be outside the scope of regulatory consideration.

It would be unfortunate to ignore the potential of a non-adversarial process in other stages. Specifically, I would urge that you consider applying the principles and procedures embodied in the present draft resolution to the oversight stage as well, with the commissions in that case advising the Congressional committees having jurisdiction in the matter.

I will now comment on the specifics of the draft resolution.

Section 1, paragraph 4: It is asserted that the present process "does not directly involve those in business and public interest organizations most in a position to understand the effects of regulations. . ." It would be more correct to state that it does not involve them in a manner conducive to searching out an exploring mutually acceptable alternatives.

Section 1, paragraph 5: The statement is true, but it may leave the impression that regulatory negotiation has the potential to eliminate such adversarial proceedings. It would be more realistic to expect it to reduce them, as a wider consensus is achieved. One can also expect, I might add, that some non-participants will try to discredit the agreement and even the particular individuals who were party to it.

Section 2: Is the exclusion of economic regulation deliberate, and, if so, is this wise? As we concluded in the coal project, the nature of economic regulation can be such as to have a profound effect on resource consumption and environmental impact. I would think that regulatory negotiation could play a useful role in such matters.

Section 3(a): The provision of federal funds, as called for in this section, is essential, especially for those participants who do not have an economic stake in the regulatory decision. The coal project was the beneficiary of generous contributions from a number of foundations. This support made it possible for the expenses of environmental participants to be met from other than industry contributions, thereby removing the appearance (or the reality) of a conflict of interest. But foundations were attracted to the coal project in part, I think, because it was the first of its kind. It is doubtful that they would support continuing operations on a large scale.

Section 3 (c), (d), and (e): There may be independent competing applications. In such cases, the agency head might well attempt to merge the bona fide applications into a single commission of manageable size. Another potential problem is that of interested parties who choose to opt out of the process, because they might believe that to participate would possibly limit their future options. This has no easy solution, but their reluctance may be overcome by the close relationship to the decision-making agency and, hopefully, the participation of adversaries of equal stature.

Section 3(f): The mediator should be acceptable to the participants. I would also note that the role of the mediator might well vary from case to case, depending on the issue and the individual participants.

Section 3(g): The per diem figure ($150 per day) is the same as that used in the coal project for the people from environmental and similar organizations. (Participants from industry were supported by their companies.) This figure, which we set three years ago at the start of the project, is probably not now adequate. I would suggest using the same maximum as is currently in effect for consultants to federal agencies.

Section 3(h): This is the appropriate manner of agency participation.

If the proposed regulatory negotiation is to work well, it must not significantly delay decisionmaking. This points to the crucial importance of time and timing.

It takes time for a regulatory negotiation to reach agreement. Time is needed to develop mutual respect, trust, and working relationship, to evaluate alternative proposals, and to sound out constituent groups and individuals.

If a regulatory negotiation commission is not formed until after a proposed regulation has been published, it will probably not have time to reach a consensus. And even if it did, the proprietary interest of the regulators in their proposed approach might well close their minds to innovative alternatives.

From both points of view, then, the best time to form a commission is immediately following the enactment of the enabling legislation.

It has been a pleasure and a privilege to appear before you today. I believe that your intent, as suggested by the draft resolution, is most positive and worthy of support. I trust you interpret my comments in the spirit in which they are given, that is, in the nature of a refinement and broadening of a basically sound proposal.

Mr. Chairman, in closing I ask that the Summary and Synthesis Report of the National Coal Policy Project, "Where We Agree," be included in the files of the committee.

STATEMENT OF LAURENCE I. MOSS, ENVIRONMENTAL CAUCUS, CHAIRMAN OF THE NATIONAL COAL POLICY PROJECT

Mr. Moss. I think the draft resolution circulated by the committee on July 3, 1980, is carefully conceived and worthy of our support. I will comment in detail on it in a moment. But, before I do, I would like to set the context by noting how the scope of what is proposed by the committees compares with that of the coal project.

In the case of the coal project, any issue thought to be important by the participants, whether it affected the supply of, demand for, or impact arising from the use of coal was fair game for discussion. It is not surprising, then, that only a fraction of the issues considered by the coal project were at a stage in the decisionmaking process where regulatory negotiation as implicitly defined by your committees would be useful.

We can think of there being at least five stages in the usual development of the governmental decisionmaking process. The first is conceptual, where a problem is identified and fundamentally different approaches to a solution are assessed. The second is legislative, where the focus usually narrows to one or very few approaches as to legislation is fashioned. The third is regulatory where an executive agency interprets the legislation in the process of promulgating specific rules and regulations. The fourth is validation as aggrieved parties petition the courts to overturn the regulations and even the enabling legislation. Now, notice that in the steps I've listed so far there is a continuing narrowing of the focus from the broad to the narrow. The fifth step is oversight as legislative bodies and others, after some time has passed, review the impact of the laws and regulations and propose changes they believe desirable. These changes might be in the nature of fine tuning on the one hand, or conceptual on the other, in which case the cycle returns to the first stage. At this stage in the process, there is a potential for broadening it again to include a wider range of alternatives and possibilities.

Negotiations can be useful in increasing the area of consensus in all of these five stages. In case of the coal project, which was comprised of people from the environmental movement, along with people from coal mining, electric utilities, steel, chemical, forest products, and other major industrial sectors, the negotiating agreements occurred on issues in these various stages. We generally found, though, that it was particularly difficult to reach agreement on issues in the active legislative stage. In fact, in some of those cases, it was thought best to not try to develop consensus until the legislation had been enacted, when the focus would, of course, shift to the regulatory stage.

Your resolution, as I interpret it, would largely sidestep this problem by focusing exclusively on the regulatory stage, where, although success is by no means guaranteed, it is perhaps more likely. Here I am defining success in terms of both reaching agreement among the negotiating parties and having an immediate impact on a decision. Issues in the conceptual stage may be equally subject to negotiated agreement but since no decision is imminent it takes much longer to measure success.

In my prepared testimony I give some examples from the Coal Project of cases in which we were dealing with the regulatory

phase and had an immediate indication of either success or failure. On other issues, when we were in the conceptual stage or the legislative stage of issues, it was much more difficult to make a measurement of our impact. I describe these examples because I see a paradox to which I would like to draw the committee's attention.

By focusing on the regulatory stage, one is perhaps most assured of impact, or at least of prompt consideration and a timely decision. But the penalty for restricting one's focus to the regulatory phase is that some of the most important questions and attractive alternatives might be outside the scope of regulatory consideration. For this reason, I think that it would be unfortunate to ignore the potential of a nonadversarial process in these other stages. Specifically, I would urge that you consider applying the principles and procedures embodied in the present draft resolution to the oversight stage as well, with the Commissions in that case advising the congressional committees having jurisdiction in the matter. This would be a supplement to the committees' present initiative rather than the replacement for it.

I now would like to turn to the draft resolution and propose some specific changes or additions.

In section I, paragraph 4, it is asserted that the present process "does not directly involve those business and public interest organizations most in a position to understand the effects of regulations." It would be more correct, I think, to state that it does not involve them in a manner conducive to searching out and exploring mutually acceptable alternatives.

The current manner of involvement is more in the nature of a formal minuet rather than a deep probing of different positions and searching out of consensus. So, perhaps rephrasing of that would be appropriate.

In section I, paragraph 5, the statement is true but it may leave the impression that regulatory negotiation has the potential to completely eliminate such adversarial proceedings. It would be more realistic to expect it to reduce them, as a wider consensus is achieved. One can also expect, I might add, that some nonparticipants will try to discredit the agreement and even the particular individuals who were party to it.

That's one problem of which you should be aware. Nonparticipants, including those who were invited but chose not to participate, may seek to discredit the process and therefore destroy the beneficial effects of any concensus. This need not be a disabling problem, but one must be alert to it.

In section II of the draft resolution, I wonder about the exclusion of economic regulation from this regulatory negotiation process, and if the exclusion is a deliberate one, is it wise to do so? As we concluded in the coal project, and I give some examples in my prepared testimony, the nature of economic regulation can be such as to have a profound effect on resource consumption and environmental impact. I would think that regulatory negotiation could play a useful role in such matters, as in the more direct health, safety, and environmental impact regulatory matters.

In section III(a), I would note that the provision of Federal funds, as called for in this section, is essential, especially for those partici-

pants who do not have an economic stake in the regulatory decision. The coal project was the beneficiary of generous contributions from a number of foundations. This support made it possible for the expenses of environmental participants to be met from other than industry contributions, thereby removing the appearance—or the reality—of a conflict of interest. But foundations were attracted to the coal project in part, I think, because it was the first of its kind. It is doubtful that they would support continuing operations of this type on a large scale. Here is where the importance of Federal funding is evident.

In section III (c), (d) and (e), I would note that there may be independent competing applications for formation of these commissions. In such cases, the agency head might well attempt to merge the bona fide applications into a single commission of manageable size. I would subscribe to earlier comments of Harrison and Frank that you can't allow this to grow beyond the size where the discussions are tractable. Another potential problem is that of interested parties who choose to opt out of the process, because they might believe that to participate would possibly limit their future options. I don't believe that problem has an easy solution, but the reluctance of such people that participate may be overcome by the close relationship of the proposed commissions to the decisionmaking agency and to the Congress, and hopefully, by the participation of adversaries of equal stature in the Commission.

In section III(f), the mediator, I believe, should be acceptable to the participants. Here I stress participants, not necessarily applicants. I agree with Harrison Loesch that applicants should not have a veto on any of these Commission matters. I didn't interpret the committee's draft to set up such a veto of applicants, but if it could be interpreted to do that I think it should be changed.

I would also note that the role of the mediator might well vary from case to case, depending on the issue and the individual participants.

In the coal project, we had little in the way of active substantive mediation by a third, presumably impartial party. The principals themselves were able to establish working relationships that allowed them to move ahead on the issues, and that should be allowed under the procedures of the proposed Commissions. It is not always necessary to have a forceful mediator present. In any event, the mediator should be sensitive to what is going on in a particular Commission and be able to take any of a number of roles.

In section III(g), the per diem figure of $150 per day is the same as that used in the coal project for the people from environmental and similar organizations. Participants from industry were supported by their companies. This figure, which we set 3 years ago at the start of the work, is probably not now adequate. I would suggest using the same maximum as is currently in effect for consultants to Federal agencies.

Section III(h) specifies, this is, I believe, the appropriate manner of agency participation, as observers, rather than as full-fledged participants in the work of the Commission. With respect to your question earlier, Senator Boschwitz, I would note the extraordinary difficulty of a Federal agency participant arranging for agency

clearance of his joining in to a Commission recommendation that may be at odds with existing administration policy. It would be impractical. It's even cumbersome with regard to participants from environmental or corporate or labor organizations. For that reason, in the coal project, we specifically said that people were there as individuals, rather than as representatives of the organizations, although clearly they were picked because of the important roles they played in their organizations and the constituencies that they had.

Let me turn to another very important point. If the proposed regulatory negotiation is to work well, it must not significantly delay decisionmaking. That would defeat the intent of this proposal. This points to the crucial importance of both time and timing. It takes time for a regulatory negotiation to reach agreement. Time is needed to develop mutual respect, trust, and working relationships, to evaluate alternative proposals, and to sound out constituent groups and individuals.

If a regulatory negotiation commission is not formed until after a proposed regulation has been published, it will probably not have time to reach a concensus. And even if it did, the proprietary interest of the regulators in their proposed approach might well close their minds to innovative alternatives.

From both points of view, then, the best time to form a commission is immediately following the enactment of the enabling legislation. Perhaps you could consider ways of encouraging that in the writing of your proposal.

It has been a pleasure and a privilege to appear before you today. I believe that your intent, as suggested by the draft resolution, is most positive and worthy of support. I trust you interpret my comments in the spirit in which they are given, that is, in the nature of a refinement and broadening of a basically sound proposal.

Thank you.

Senator LEVIN. Thank you all.

[Subsequent information was received and follows:]

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September 1, 1980

The Honorable Carl Levin
Select Committee on Small Business
U.S. Senate
Washington, D.C. 20510

Dear Senator Levin:

I've had further opportunity to reflect on the concerns you raised in the July 29, 1980 hearings on regulatory negotiation. You will recall that you observed that a good idea can be killed if it is not placed within an appropriate institutional setting. Sepcifically, you concluded that it was important, if regulatory negotiation were to succeed, to separate the appointment process from the agency.

I find your arguments persuasive, and have given some thought to how this might be done, without, as you say, creating "a whole big bureaucracy." Although I haven't found the perfect solution, and indeed doubt that one exists, I think there is merit in the following approach. It is to create (through legislation) a private organization to manage the appointment process. Let us call it, for the present, the Institute for Regulatory Negotiation. Its governance might be entrusted to a board of directors comprised of individuals experienced in negotiation and mediation, drawn from the wide spectrum of interested organizations and parties (environmental, industry, labor, university, etc.). Beyond the appointments process, the Institute might well play a useful role in providing a physical setting and an administrative apparatus for the conduct of individual negotiations, thereby building an institutional memory that would serve well in subsequent negotiations.

I think it possible that this idea, after development and refinement, may be attractive to one or more private foundations, who might then be willing to contribute to the funds needed to establish such an organization.

If you think this outline of an idea has merit, I would be glad to explore it further with you and your colleagues.

Please feel free to include this letter in the hearing record if it is useful to do so.

Sincerely,

Laurence I. Moss

LIM:akm

Senator LEVIN. First of all, Professor Murray, do you agree with Mr. Loesch that there should be an opportunity to meet in executive session or in private?

Mr. MURRAY. Mr. Chairman, I think that it's very important. That was one of the things that I think we discovered very early and one of the reasons that our project was designed somewhat along those lines that it was. In the negotiating stage the task forces usually met in executive session, with one or two exceptions. This allowed them to get to know each other, and also to begin to work their problems out among themselves.

Senator BOSCHWITZ. Executive session meaning private?

Mr. MURRAY. Primarily, those present were the members of the task force, for example, the 12 or 16 members, with perhaps 1 or 2 observers or advisers who normally followed that task force's work.

Senator LEVIN. Is there the understanding that there would be no reports to the press without the consent of everybody?

Mr. MURRAY. Yes, there was. That was one of the ground rules which we had set for the group. Until agreement was reached and everyone had, in effect, consented to an agreement, that there would be no premature releases, and there would be no individual speaking for the group.

Mr. LOESCH. If I can interrupt for just a second, Mr. Chairman, I think that it should be pointed out, however, that the mining task force did its job by taking field trips to nearly all parts of the coal provinces in the country, and what we did was go and see something for a whole day, by bus or however. During that part of the process, we had local press, members of local organizations—environmental or local companies who were operating in the area—and so forth. Then, following that day of on-the-spot viewing, we went into session the next day—a business or executive session so to say—to which only our members were invited. Now, I thought that the participation of the local people and the press, for that matter, in our field trips, was very positive. I wouldn't necessarily advocate that you don't have a substantial amount of public participation in the resolution area. But, I do think that the commissions are going to have to be able to get together by themselves, take their hair down, and negotiate things out or it won't work.

Senator BOSCHWITZ. What did you go out and view?

Mr. LOESCH. I beg your pardon, sir?

Senator BOSCHWITZ. What did you go out and view?

Mr. LOESCH. Coal mines.

Senator BOSCHWITZ. Weren't all these people familiar with the subject at hand?

Mr. LOESCH. Sir, the conditions of surface coal mining in this country are as varied as you can imagine. They are so varied, for example, that surface coal mining in southern Appalachia is an entirely different deal from northern Appalachia, let alone from Montana or Wyoming or Texas. The task force went to Texas to see the lignite, and went to the northern Great Plains, to see that area. It went to the Illinois basin, it went to northern and southern Appalachia. We had intended to go to southern Rocky Mountain, Utah area, but time and money ran out. But we did all that, and we did it very conscientiously. I doubt if there was anybody on that task force, skilled as they might be, who knew ahead of time the

things they were going to see that were different from other areas and that required perhaps, and certainly did in our agreement, different solutions.

Senator LEVIN. Mr. Moss, do you have any comment on the question of whether the negotiating meetings should be closed and whether there should be a general understanding of no comments to the press until everybody is in agreement to do so?

Mr. Moss. First, as far as I remember, no one was excluded from a task force meeting or plenary meeting of the coal project who wanted to attend. However, in the case of task force meetings where we wanted the group to discuss the recommendations that might be issued, we didn't seek out a wide audience and most people didn't think to invite themselves. So I think that more nearly describes the situation than to say that we made an explicit decision to go into executive sessions. As a matter of fact, for the plenary group meetings I don't think we had any executive sessions.

Mr. MURRAY. No, we didn't.

Mr. Moss. They were all open and we had a very wide audience for the plenary group meetings, having invited many people. For the task force meetings we didn't explicitly go into executive session but in those cases we were usually the only ones there.

Mr. LOESCH. Well now, I have to argue that a little bit. On my task force, we had a little hassle once because we explicitly kicked out some people who weren't on the task force. That was in Montana. They were press and just members of the public.

Mr. Moss. I stand corrected on that point. I was unaware of that incident.

On some occasions, we did invite some people from the press to attend a task force meeting if they were willing as all were, to accept a ground rule on the timing of the release of their stories. That was that the stories about the coal project would be held until we were ready to issue our recommendations or had agreed to disagree, and then they could write about those recommendations, or the process of arriving at them, or anything else they wanted to. But we didn't want any prior release of our discussions. So in that way we sought to encourage public and press involvement.

Senator LEVIN. I am intrigued by the role of the mediator in this proposal. What experience you had with mediator types from your testimony, Mr. Moss, would indicate you did not consciously seek out a typical role for a mediator, which is, in my experience, one who steps into a conflict and in a procedural way, in a kind of nonsubstantive way, tries to get the parties together without providing any substantive conclusion of his or her own.

I know I've been in that role where I try to bring the parties together, not particularly caring to reach a judgment of my own on the merits, more interested in getting the parties together on the merits so they can reach some type of conclusion that might not have been my own as an arbitrator. So be it. It's none of my business. I'm there to help them find a solution. Now, when we use the word "mediator" in this resolution, it seems to me that we might be changing the character a little bit of what you folks were involved in, just by emphasis on that role and I'm wondering if you would expand a little more on your comments and then I'd like the

others to also add theirs on the mediating role in these negotiations. Whether or not casting a light of some kind dramatizing that role in this resolution might change the character of those negotiations from one which seeks a concensus kind in a positive way to one that seeks to solve the conflict. Of course, there are aspects of both in any event. Would you comment on that?

Mr. Moss. Yes, I would be glad to.

In our case we had a neutral chairman of the plenary group, which was the governing group for the entire project. He was Francis X. Quinn of Temple University, and he played a splendid role in chairing the group and in facilitating the discussion, moving things forward. Only on rare occasions, though, did he exercise the role of an active mediator, in the sense that you described. In the case of the task forces, there was no neutral chairman or mediator at all. The chair was held alternately by the environmental cochairman and then the industry cochairman of each of the task forces.

I don't know that our experience is broadly transferrable to other situations. I think we were quite fortunate to have at least a small group of leaders on both sides who did trust each other, who had developed in previous associations some valuable working relationships, and, when the inevitable conflicts arose and impasses were reached, could work together to seek to overcome those impasses. They weren't entirely successful in every situation, but by and large they were successful. They had a good deal of support from the members of their individual sides, so they could often assemble a consensus among their side on the proper course of action.

Now, that may not be the typical situation in the proposed commissions, so I would certainly want to leave the door open for a very active mediator who might be necessary in at least some of these circumstances. But it would be nice, I think, to allow the possibility of the kind of relationship that we enjoyed, because it can work very well.

Mr. MURRAY. Mr. Chairman, I think the key to our effort was really negotiation rather than mediation. In that setting, the project tried to create conditions where the parties would respond in a problem solving try to resolve their differences together. If they could resolve their differences or unscramble the differences, so be it; if not, they could negotiate the less important points with each other. I think that was the basic character and nature of the project.

Our role in the project was really to facilitate these discussions and to keep the parties together; the parties actually did the negotiating. They actually went through the problem solving, and that is very important. I think it will vary from situation to situation, depending on the individuals involved, and the issues at hand. Whether negotiation or even arbitration might be preferable in some instances, as opposed to problem solving or mediation, or another approach, should be determined on a case-by-case basis. Each of the techniques is somewhat different, and each varies depending on the circumstances and the situations.

Mr. LOESCH. Mr. Chairman, my thoughts on this are that like everything else, in government and out, it's going to depend on the

people that run it and the goodwill that they have. Now, I think that a mediator who understands what he's trying to do is important. The whole thing is based on voluntary participation in the first place, and a mediator should understand that he's there to foster a relationship between the two sides, or in many cases the half a dozen sides involved, to encourage good faith participation and not to attempt to come to his own decisions. As you suggested earlier, this, I think, might be very well. I can see that a mediator who took an active part with his own ax to grind, which I have seen among administrative projects, could be a very bad thing. It's just going to depend. If it works, it's going to work because of the leadership and the attitudes of those who participate. It doesn't work if they don't have it.

Senator BOSCHWITZ. When did these meetings take place; 1977? How long did they go on? From when to when?

Mr. MURRAY. The project formally started its meetings in January of 1977. Most task forces met about once every 6 weeks or so over the next year. Most meetings ran 1 to 2 days depending on the nature of the issues discussed at the meeting. In the case of the field trips, these would sometimes extend longer.

The first phase of negotiations ended in February 1978. Subsequently, a second round started in December 1978, and went on for approximately a year after that. Not all task forces were active in that second phase, but four were.

Senator BOSCHWITZ. So, what are the results? Where are the regulations?

Mr. MURRAY. The results of the effort are contained in a three volume work entitled "Where We Agree," which contains about 1,000 pages presenting the recommendations. In some cases they call for legislation; in some cases regulatory change or new regulations; in some other cases how regulations or implementing instructions might be drafted; and finally, general policy guidance regarding to the use of coal. There is a broad range of areas covered. They are not confined to just regulations. They are not confined to just legislation. They try to deal with the important issues related to coal use; whether they are regulatory, legislative, or matters of corporate or environmental organization policy.

Senator BOSCHWITZ. So, what about the results. Have there been any regulations? Are you satisfied with the regulations on your side, Mr. Loesch? Are you satisfied with the regulations on your side, Mr. Moss?

Mr. Moss. Senator, in my testimony I give some examples of our successes and our failures. One example of a success in the regulatory sphere is the promulgation by the Federal Energy Regulatory Commission of rules and regulations dealing with the pricing of standby power to cogenerators and the sale of surplus power by cogenerators to utilities, which very specifically follow our recommendations, with regard both to how it should be done and even on how it should not be done. Also, we have some specific examples of regulatory implementation of the Surface Mining and Reclamation Act in response to our proposals.

As for the issues that are further removed from regulatory stage, and thus far more difficult to assign cause and effect relationships, I think that there's been a movement, both within the administra-

tion and the Congress, in some of the directions we've indicated. For example, we come out very clearly for less economic regulation of energy markets for a variety of reasons, conservation and environmental reasons, as well as energy production reasons, and I think the administration and the Congress since we issued those regulations have moved in that direction. We have also come out in favor of less——

Senator BOSCHWITZ. Do you think you have moved in that direction?

Mr. LOESCH. I think we have, but I don't necessarily think we can take the credit for it.

Mr. MOSS. I agree, and that's one of the points I'm making. Obviously on issues like that, there are many people speaking out on both sides and, as I say in my testimony, it is typically not clear in such cases that any one individual or organization played a decisive or important role.

Senator BOSCHWITZ. Other than the Federal Energy Regulatory Commission, have any of the other recommendations which you've made in this report been implemented in regulations?

Mr. MOSS. In regulations?

Senator BOSCHWITZ. Yes.

Mr. MOSS. Yes.

Mr. LOESCH. Yes, in surface mining, coal regulations, there's a good deal of them.

Senator BOSCHWITZ. In other words, they moved pretty quickly after you made the report?

Mr. LOESCH. Well no, I can't say that, Senator.

Senator BOSCHWITZ. The report was made relatively recently.

Mr. MOSS. In early 1978, so it's been——

Senator BOSCHWITZ. Pardon me, it was early 1979.

Mr. MOSS. We started in early 1977.

Mr. MURRAY. The first round was finished up in February 1978, and at that time there were many recommendations released on surface mining and many other areas.

Senator BOSCHWITZ. On the basis of that, there have been some regulations put forward.

Mr. MURRAY. Yes.

Mr. LOESCH. Senator, if I could interrupt, at that time when our report came out, the surface mining program interim regulations were already in effect, but the agency was then developing its permanent regulations which were afterward promulgated. There's been a lot of litigation over those regs and my company's been involved. I can't say that because of our participation in the coal policy project we changed the company views. Just the same, my company took to heart a number of the recommendations of the project, put them into effect, and you could see them reflected right today in some of the regulations under the Surface Mining Act, even though the litigation has got that kind of balled up now, so we don't really know where we are until the dust settles a little bit.

Senator BOSCHWITZ. However, I suppose the question is answered by your presence, but you are satisfied that your participation—you are associated with Peabody, right——

Mr. LOESCH. Yes, sir.

Senator BOSCHWITZ [continuing]. That the participation of your company, and the participation of Mr. Moss and other members of the Environmental Caucus was helpful in obtaining regulation that you subsequently endorsed. Perhaps not.

Mr. LOESCH. Yes, I would be satisfied with that. I think it was a very valuable exercise.

Mr. MOSS. I'm satisfied that, on balance, it was worth the effort. I think we had both successes and failures but in a game like this, especially considering the sweeping scope of our recommendations, I think it would be entirely unrealistic to expect rapid and comprehensive implementation of all of them.

Senator BOSCHWITZ. It is entirely unrealistic to expect anything other than successes and failures, I suppose.

Mr. MURRAY. Senator, if I may, I think one point to add is the fact that the proposal of the committee in effect ties in the recommendation of any such negotiating group to the decisionmaking process. This is something that the National Coal Policy Project did not have the advantage of. When our recommendations came out, we usually had to take them to the agencies, tell them who we were, how we had reached our conclusions and what the recommendations were. In many cases, we probably came unannounced and unwanted into their lives, and asked them, in effect, to change the regulatory rules, and proceedings. I think the proposed negotiating commission approach would plug in those recommendations more directly, and therefore, more effectively, into the regulatory decisionmaking process. I think that's very important.

Mr. MOSS. In that connection, I think it is very laudable that in the committee's proposal, the reports of the commissions will go to the Congress as well as to the agencies. Then the agencies will appreciate that they should have some good answers on hand for the questions likely to be asked by interested Senators and Congressmen, if the agency decides to reject the recommendations.

Senator BOSCHWITZ. I was intrigued by the absence of the Government in these negotiations. You said they were there often, is that correct? They were not participants and didn't have any voting rights, and so forth. I think that is quite right that they shouldn't have voting rights, because otherwise they are there more for an educational exercise, I would suppose, rather than to be part of the adversary system.

Mr. MOSS. Educational in two ways; we've learned from them, as well as they've learned from us.

Senator BOSCHWITZ. Yes, I understand that. But, were meaningful people who had been invited to the regulations part of all of the sessions that you were involved in?

From Professor Murray's kind of response to answer that question, some of them were surprised, did you say, or some of them were not conversant with your report when you brought it to them.

Mr. MURRAY. Let me be very candid and explain the problem with agency participation. I think that generally the nature of the negotiation process is a time consuming, long run effort that doesn't occur within the space of a few days. Therefore, it is hard to get people at the top levels of an agency, regulatory or otherwise, to participate meaningfully and fully. Generally the agency heads delegate it into the system three or four levels down, and a

staff person attends, who perhaps is knowledgeable about the area, but probably has no direct line of communication, up to this chief. So, that while this person can give information, and certainly is knowledgeable about the organization's policies, the rationale behind them, and the issues at hand, effective communication back through the organization does not always take place. So, yes they did attend, but, in fact, in many cases they were unable to really prepare the way for us when we brought our recommendations back to their organization, because of their position in the organization.

Mr. LOESCH. Excuse me. One thing, Senator, too, that from my governmental experience—I worked for the Government for a while—I would believe that the agencies concerned had certain inhibitions about any really heavy participation in this kind of thing. You want to recognize that this is a totally private idea of Jerry Decker, Larry and their colleagues, was financed privately; first by foundations, some industry contributions, and the contributions such as in my case. My company just said, "you do it," and continued to pay my salary and travel expenses for the purpose of participating. Remember that our project got criticized for not having enough people in it, even though some of the people did not want to participate. First, we were criticized for not having labor representation. Well, we had invited labor representation and they preferred to not be a part of it, and there were some environmental organizations and some businesses that didn't want to be a part of it. So, in that kind of climate, the agency might have an institutional inhibition against getting too heavily involved on the basis that it could be criticized for a special interest participation.

Mr. Moss. There were exceptions to what Frank and Harrison have just said. For example, in dealing with the conservation and fuel utilization issues, the task force met on more than one occasion with the key staff people in the FERC. As a matter of fact, I think we probably have one of the first dinners that's on the public record, with a public stenographer recording all the conversations, so it would be available to anyone who was interested in reading what went on.

Senator BOSCHWITZ. Did you record what everybody ate as well? [Laughter.]

So, in any case, you are satisfied with the level of participation. You didn't think you were handicapped in getting the final results because you didn't have adequate governmental participation from the standpoint of right level or enough attending?

Mr. LOESCH. I couldn't go that far, Senator, at all. I think there could have been a good many improvements. We didn't, many times, reach agreement that I think might have been possible with more time and more expertise from whatever source.

Senator BOSCHWITZ. Always, that can be said about any type of negotiation or conversation. But, you think, in the balance, on the whole, it functioned well, as it was supposed to function, and that you were not hampered by the absence of any parties.

Senator LEVIN. Seriously hampered, could I modify that?

Senator BOSCHWITZ. Seriously hampered. I am concerned that the guy who writes the regulation is not there at least as an attendee, observer, or even as a participant without voting rights.

Mr. LOESCH. I suspect it would be better that way. Certainly, the influence that you could bring to bear if you could identify a single regulation writer and have him a part of the process, might be very effective and, based on our process, I think it would come out pretty even. Industry would lose some skin, and environmentalists lose a little, maybe. But, the problem is that in any big agency that's writing regulations, you've got teams and teams and teams of them, and you've got some focusing on a narrow little area down in chapter regs and you've got another team focusing on the middle areas. So, you're never, ever, going to have all regulators, or even a significant part of them as a part of this process, or else you're going to have such a big outfit that it won't work.

Senator LEVIN. I would like to pick up from that question. Is it fair to say that even without that it was valuable?

Mr. LOESCH. Yes, it was, Mr. Chairman.

Senator BOSCHWITZ. Pardon me, Mr. Chairman, I notice in—staff has just shown me that—one of the resolutions, section 4, it says:

> The approved commissions shall consist of those individuals in organizations nominated by the applicants. I'm not quite sure who the applicants are. Plus, such additional individuals in organizations that the appropriate agency had made suggestion to agree to participate and who the applicants agree to include and the agency head shall attempt to assure that all important sides of the dispute are included such as representation of labor, business, and public industry organizations.

So the agencies are apparently very much involved.

Who are the applicants?

Oh, an applicant is anyone who makes an application to such.

Mr. MOSS. In that regard, I think it is important that there be some screening by the agency head of applicants. You wouldn't want every person who applied to automatically be given a seat on the commission regardless of his or her interest in the issue or the degree to which he or she had a constituency of individuals or organizations that were deeply concerned with the issue. I think that these things should be weighed and I know that that gives rise to problems. It may set up a situation where the agency head, if he chooses to, could sabotage the whole process. But, I think that there is a good enough chance that the agency heads will view this as a constructive opportunity so that they could play a constructive role in forming these commissions.

Senator LEVIN. I think the real danger is perhaps the opposite of what we've been talking about; not the lack of participation by the agency, but the involvement of the agency. I think that there's a greater danger in it, as I perceive this, there would generally not be an ongoing process after regulations are published. I would like to press that question with you. Is it your experience, first of all, that there had been any publications of regulations that you commented on, either in your interim report in 1978 or in your final report in 1979, and if so, what was the impact of that and what was the reaction of the agency to it? If the agency had participated in your negotiations wouldn't that have created a real credibility gap of their final product, their having participated in outside efforts which resulted in a recommendation, and in their making a decision on it? Isn't that a great pitfall of the agency involvement in this kind of effort? Because you want it separate and independent from the agency so that there is no question but that the agency

used this as something separate and apart from its own process and just a recommending device to it, rather than something that's part of it.

Mr. Moss. Well, you asked several questions.

Senator LEVIN. I am afraid not very clearly, either.

Mr. Moss. We indeed did comment on draft regulations. In some cases, we——

Senator LEVIN. After publication?

Mr. Moss. After publication. In some cases, those comments were in the nature of formalizing informal recommendations that we had made in discussions with agency people, some of which were on the record, as was the case for this FDRC dinner that I spoke of. In other cases, where the agency had not been as involved in the process, in the discussions, it came as more of a surprise, more of a completely independent type of effort to them. I think the chances of implementation are probably greater in the former case than in the latter case because if the agency participates even only as an observer, they are less likely to develop a "not invented here" syndrome about the commission recommendations.

Senator LEVIN. In what syndrome?

Mr. Moss. "Not invented here." It means that because it wasn't drawn up by their own people, they look askance at any recommendations made by an outside group not done in some association with the agency. So we get it both ways.

Senator LEVIN. See, what I am really concerned with is that this approach, which I think bears tremendous promise, mainly because of its voluntary nature, could be subverted by too close an agency connection, either chronologically, as part of the rulemaking process, or physically, in terms of having the presence of an agency.

Take a look at how an agency functions. You've got a rule that is proposed and published. There is a comment period for the public. Now, you're part of the public that wants to make a comment. You don't like the rule, whatever it is, you make comments. Then comes along this commission that's been appointed by the agency, and maybe the mediator, so called, has been appointed by the agency. Maybe an agency person is even sitting in there, then that would be a real mistake with or without that added problem.

Now, you're not involved in that process, you're just some person out in Omaha, or something. You don't like the product of the group, you don't like the product of the agency. You come along and say, "what is this, what kind of public comment is this?" How can they consider my comments fairly? They just appointed a group over there, their own appointees, their own appointed mediator comes in with a recommendation. Doesn't that diminish the credibility of the final product of the agency if we don't do this carefully?

Now, I come at this from the point of view of someone who likes this idea. I think there's a real possibility for broad use of this idea if we are careful to separate it chronologically, and in terms of personnel, from the agency. I can see where it would be better and advantageous in both ways. What I'm afraid of is that the disadvantages of too close a connection to the rulemaking process chronologically in terms of personnel would outweigh the advantages of

them, which is the obvious problem that the agency might listen more closely to. So, can you comment on my fears. Are they justified?

Senator BOSCHWITZ. Pardon me, Mr. Chairman. I really do have to go down to the Agriculture Committee which is right underneath us.

Senator LEVIN. We can come back to that.

Senator BOSCHWITZ. I am going to go and I won't come back, and I apologize to the next witness, but let me just make a comment in closing, if I may, and then get back to the witnesses. It would concern me if the regulators had not made those trips out to see those various types of mining. I'm no expert in mining, by any means, and in north and south Appalachia, or in Wyoming or in the Rockies, and wherever else they do strip mining, and so it wouldn't bother me particularly if they went together with this group. It would bother me if they didn't go at all. I think the education that this group got, and they met only 2 days every 6 weeks you said or so, is not in advertence among the regulators that I don't think it would be intimidating. They wouldn't have to be intimidating. But, in any case, it was your idea, Mr. Moss?

Mr. MOSS. The idea was originally that of Gerald Decker, who was, at the time, corporate energy manager of Dow Chemical. He approached me because of our association on the Federal Energy Administration's Environmental Advisory Committee, and I was helpful in getting a group of environmentalists together to listen to what he had to say, and then I continued to play a leading role in the project. But, Jerry Decker deserves the credit for believing that the idea might work.

Senator BOSCHWITZ. I want to agree with the chairman in being very positive about the approach and congratulate you all for participating in it, and congratulate you, Mr. Moss, for your work in helping to originate it. I too agree with you, Mr. Chairman, that this is a very positive thing that we're hearing about this morning. Pardon me for interrupting.

Senator LEVIN. No problem, come back and interrupt any time.

Mr. LOESCH. Mr. Chairman, I was just going to make an observation apropos what you were saying. I have a very similar fear to yours, and I would point out to my environmental friends that one of the great big serious objections that the entire environmental community had a number of years ago in connection with the Interior Department was the advisory committees that the Bureau of Land Management had. These committees, as they called them, both at the district and national levels, State levels, were pretty well weighted by what BLM considered its mission to be at the time and consisted almost entirely of stockmen, timber people, the users of that kind, commercial, industrial users of the public land. The environmental community, across the board, took a dim view of that because the recommendations by the advisory committee to the BLM people were always pretty well directed by the BLM people. They worked it around so that the advisory committee would recommend what they wanted, what the bureaucrats wanted, at any level, at the district level, at the State level, at the national level. I can visualize very well that if we tried this plan and if there were too close relationship with the agency concerned that you'd have exactly the same problem.

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Mr. Moss. If I might comment on that. I am not as familiar with that situation as is Harrison, but I imagine that at the root of the environmental and public interest opposition to those committees was the fact that the membership of those committees was almost entirely made up of the economic interests that would be served by the particular BLM land use decisions. And, something quite different is proposed in the commissions, in your draft resolution, where explicitly the noneconomic interests such as people concerned with the environment, public health, and safety would be given major roles. That would tend to dampen some of the criticism of the commissions that might otherwise occur. But a lot depends on the stature of the individuals who are selected for such an effort. If they are people of high stature with the respect of their peers and their constituents, then the possibility of the kind of criticism that Harrison referred to is certainly much less than it might be otherwise. And, also, if they are such people, it is much less likely they could be co-opted by the agency by the fact that the agency would have observers at these meetings. The participants would have experienced players in the political ballgame and they would know what the danger signals were in the process. I would expect them to stick to their guns on the issues that were really important to them, but I would assume they would be willing to move, as we found they were in the coal project toward a concensus on those issues where a vital interest was not at stake, and where a common interest could be identified.

The other aspect of your question, Senator, has to do with the chronology. As I indicated in my testimony, I would be very reluctant to see the commission act as just another means of public input after the publishing of draft regulations. I think that if you wait that long the agency has too much committed to a particular alternative, a particular way of looking at how to implement the laws. It is not flexible enough. You have more to gain than to lose by setting up the commission at an earlier stage right after enactment of the enabling legislation.

Senator LEVIN. What about the legislation on the books already? Long in the process of having regulations?

Mr. Moss. I think if I had my choice I would set up these somewhat different commissions to be part of the oversight function of existing laws and regulations and to have them begin their work perhaps a year or so before you know there will be congressional review of those laws and regulations, and to be ready at the time the congressional committees are ready to consider their recommendations.

Senator LEVIN. Professor, do you have any comments on the same question?

Mr. MURRAY. Obviously you face a dilemma. For this proposal to work and to attract the people you want to participate in it, it must have the promise of being effective. They have to see the potential fruits of their labor, that is, the resolution of the problem which they are arguing and negotiating about. They have to see that it can be effectively resolved in terms of a law, or a policy, or a regulation, and that means that it has to be coordinated or somehow worked into the Government decisionmaking process. I think that's very important because if that direct relationship is

lost between the time and effort involved in these negotiations, and it is not an easy process, as I'm sure you know, and the final outcome, then, will be that they will be unwilling to participate.

This would indicate that such an undertaking should be more closely tied in with the Government decisionmaking function. At the same time, when you do that, one sees all the problems associated with that close association, as you mentioned. Initially, when our project began, we wrestled with this at great length. We decided not to have the Government participate formally in the project deliberations and negotiations. I think the reason we did was that, in many cases, the Government participants would be inflexible in their positions or views; that is, they would feel that an agency policy was not subject to negotiation or could not be changed. Perhaps equally as important, we felt that being in the private sector, conducting negotiations in the private sector, we could more effectively take our recommendations and present them to the agency audience. The regulatory commission would have the advantage, if it were properly timed—and I think timing is important—of relating to a decisionmaking apparatus in a Government agency. The question is being able to do that without being coopted by the agency itself. And, I think of course, that is the dilemma. And, I don't have any nice, neat solution for that, unfortunately.

Senator LEVIN. If you come up with one, would you let us know?

Mr. MURRAY. I surely will.

Mr. MOSS. Frank, we might note that a number of the agency people recommended that we establish this one-step-removed role for them because they felt that in that way our recommendations would be of more use to them. The recommendations would be more likely to be unconstrained by sometimes narrow agency considerations and therefore be perhaps more sweeping, more far-reaching, and more interesting in a policy sense.

Senator LEVIN. I think that that is inevitable. I'm afraid that it is the agency which is going to hear the recommendations that makes the appointments and it is going to diminish the impact because of the appearances issue. It's like so many other things. It's like institutionalizing a person. You could kill that person, and you can kill an idea by institutionalizing it too. And, how we do this, it seems to me, is critical. I somehow would rather be inclined just, after thinking about it for a few weeks, and listening to your testimony, to separate the appointment process of the agency. How that's done without creating a whole big bureaucracy, Lord knows. It's got problems of its own. I think we're going to be building in such limitations for an agency to be picking that group, particularly if deliberations either coincide or overlap with the rulemaking process. I am very much leery of it. I say this as somebody who really likes this idea, I'm really delighted with what you folks have done. I think you've come up with something which really could bear fruit if we deal with it tenderly and not kind of rush in. It's not so much the speed, but if we carelessly institutionalize it, by having the Government put some money into it and make some appointments to it, sooner or later, if we are not careful, we are probably going to kill it. So, we thank you, and in light of the time we probably should end this panel here. We may send you some

additional questions. If you have any additional thoughts, even without being prompted by additional questions, would you send them on, particularly as to the mechanics of how can we institutionalize this without suffocating it or destroying it? How can we make it available in other instances where it should be made available without overlaying of bureaucracy or structure which just paralyzes it, raises more problems in itself. Any additional thoughts on that would be helpful. I think that a number of us on both of these committees and subcommittees are enamored with this idea and really want to make sure we don't do damage to it in the process of trying to help bring it into further use.

We thank you all for coming. You've been very helpful.

Mr. Gusman, we have finally arrived at you. I am not sure why we have separated you from this panel, but I am sure there is some logic to it.

If you have a written statement, it will be submitted in the record at this point.

STATEMENT OF SAM GUSMAN, SENIOR ASSOCIATE, THE CONSERVATION FOUNDATION, WASHINGTON, D.C.

Mr. GUSMAN. Yes, I do have a prepared statement I would like to submit, and with your permission I would like to cover some of the highlights in my opening remarks.

[The prepared statement of Mr. Gusman follows:]

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Testimony of

Sam Gusman
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Before the
Senate Committee on Small Business
and the
Senate Committee on Government Affairs
Subcommittee on Oversight of Government and Management

on the subject of
Regulatory Negotiation

July 29, 1980

Mr. Chairman and Members of the Committees, I welcome this opportunity to discuss with you the draft Resolution on Regulatory Negotiation and to present, in support of this concept, some comments based on relevant experience of The Conservation Foundation over the past four years. The Foundation is a non-profit research and communications organization based in Washington, D.C. The Foundation's primary purposes are to improve the quality of the environment and to promote wise use of the earth's rerources. The Foundation achieves these purposes by conducting interdisciplinary research and by communicating its views and findings to policymakers and opinion leaders. Since its founding in 1948, The Foundation has been characterized by reason and balance in its work, recognizing the importance of a healthy social and economic climate to the achievement of

conservation goals. The Conservation Foundation does not have members and is not a lobbying organization.

My name is Sam Gusman; I am a Senior Associate with The Conservation Foundation. My responsibilities include the Foundation's program of public policy debate on toxic substances issues. I bring to this work a background of training in science and engineering, supplemented by experience in basic research, chemical product development, research direction, and general business management, as well as with the regulatory process.

The Foundation's program is, I believe, a good example of regulatory negotiation. Hence, I was pleased to learn of these hearings on this subject and to be invited to testify today. In my remarks I would like to review briefly our goals, approaches and experience--but, at the outset, to emphasize that the program continues to be experimental. We learn as we progress; we do not have all the answers. But we have, from experience, been able to identify some key generalizations, probably applicable for regulatory negotiations on any of a wide range of public policy issues.

The Regulatory Process

Our hypothesis is that some of the most desirable policy options are not explored or do not get on the public agenda because the regulatory process encourages each party, from the start, to express its own self interest as forcefully and skillfully as possible. With each party advocating its own gain to decision makers in the regulatory agency, there is a tendency

for coalitions to develop that, on environmental issues, generally appear to involve business representatives on the one hand and a consortium of labor and public interest groups on the other.

Neither side generally puts much effort into communicating with the other side, since each accepts its role as an advocate in an adversarial process where the power to make decisions is vested in the regulatory agency. Indeed, such communication could, in this circumstance, be viewed as a sign of weakness. Actions taken by one coalition are commonly viewed in their worst light by the other. The process of decision making appears to be viewed as a zero-sum game, like sports such as baseball, in which one team's gain can only be realized at the other's loss. The dynamics of such coalition politics appear to depend on actions taken against a perceived enemy, in turn leading to reprisal and counter reprisal until initial perceptions of adversarial relations are confirmed.

In quiet discussions with friends who are businessmen I found the same kind of yearning for a "better way" of deciding public policy issues as I did with other friends who call themselves environmentalists. Not surprisingly, such discussions revealed a shared belief that public policy need not be a zero-sum game, and that there are some options which yield a greater net sum of benefits than others.

Dialogue and a Search for Areas of Agreement

In conversations during 1976 I explored whether some progress could be made in bringing traditional adversaries together for

clarification of disagreements and search for hidden areas of agreement. With few exceptions, I was told, "It probably won't work, but include me if you decide to try it." During November of that year, I invited eight people to a one day meeting for discussion of two questions: Are you satisfied with the current mode of dialogue between businessmen and environmentalists on public policy issues in Washington? If not, do you want to participate in an ongoing discussion intended to clarify disagreement and search for areas of agreement?

People were invited to attend as individuals, not as official representatives of their organizations. No one refused. Those who attended a November 1976 meeting (together with their affiliation at that time) are listed below:

A. Karim Ahmed	Natural Resources Defense Council
J. Clarence Davies	The Conservation Foundation
Robert Harris	Environmental Defense Fund
George Ingle	Manufacturing Chemists Association
Glenn Paulson	New Jersey Department of Environmental Protection
William E. Towell	American Forestry Association
Gene Zeltmann	General Electric Company

The meeting was a resounding success. First, I was encouraged to proceed with development of dialogue between businessmen and environmentalists. Second, no one objected to the small group format, and to this day most of our activities involve participation by people as individuals in groups of fewer than fifteen, or in larger workshops which quickly divide into small working groups where people can most easily learn to deal with each other as individuals rather than as abstract embodiments of ideas or organizational principles. Third, support was

expressed for selection of a few specific issues for early attention. Fourth, the group expressed the belief that the program would be most likely to succeed if it became a part of an existing institution that is well-regarded by all. The Conservation Foundation was prominently mentioned in this regard. The general perception was that, lacking such affiliation, detractors of the concept might choose to discredit the project by deliberately perceiving it as the "captive" of one or another interest group.

The Conservation Foundation was at that time at the early stages of a new program, "Business and the Environment," begun in 1975 and intended to identify opportunities for cooperative problem-solving in the field of resources and the environment. The premise was that polarization between members of the business leadership and the environmental community, a consequence of the intense legislative and court battles of the early 1970's, was impeding progress in solving certain environmental problems on which the cooperation of these groups could be helpful. The program was funded initially by the Andrew W. Mellon Foundation and the Rockefeller Brothers Fund. Various elements of the program have been funded by the Richard King Mellon Foundation.

Selection of Issues

We soon recognized some general criteria for selection of issues:

o First, the issue should be at an early stage of development, before positions, publicly taken, become difficult to disavow.

o Second, the issue should be perceived as inevitable by all, so that it could not be avoided by lack of attention.

Only a limited fraction of regulatory issues meet these criteria. In effect, focus is directed at issues before the agency starts to write regulations, yet after it is clear to all that the issue must be dealt with. For some issues, this can be a narrow window through which to pass.

Toxic substance control issues were chosen initially for several reasons. First, the Toxic Substances Control Act was enacted in late 1976, establishing a highly ambitious set of regulatory responsibilities for which EPA appeared unprepared. Even the most elaborate preparations would likely have failed to equip EPA to address quickly the multitude of questions posed by the Act, involving strategies for prioritizing among the thousands of commercial chemicals, testing methods and data requirements, evaluation of new chemicals, procedures for dealing with chemicals manufactured abroad and imported into the U.S., trade secrets of manufacturers required to furnish data, etc. It appeared to be in the interest of both industry and environmentalists to avoid long delays, uncertain and changing EPA priorities, and protracted court suits to set EPA's course. For the moment, no advantage lay in repeating the kind of long and costly battles that had attended the implementation of air and water pollution laws. Moreover, knowledge of toxics regulatory issues was not widespread nor were public positions or institutional commitments yet fixed.

There appeared to be shared interests on the part of traditional adversary groups in making the new law work. Moveover, the staff of The Conservation Foundation included members with knowledge of the law and statutes in the field of toxics, experience with industry, knowledge of the scientific/technical issues, and skills in convening opposing interests in non-adversary settings.

Size and Composition of the Group; Ground Rules

The initial toxics dialogue group, which first met during the fall of 1976, remains active. For the first few years, it met every other month, but more recently has become a steering committee and only meets about every six months to provide general advice and guidance on the activities of a series of dialogue groups that are convened to deal with particular issues. The steering committee and each of the dialogue groups are comprised of about ten to fourteen people. About half of the members of each of these groups are affiliated with industry; the others are mostly affiliated with environmental groups.

Each person participates as an individual, though each is chosen for membership because of affiliation with, and influence in, an organization that actively participates in the public policy debate. Members of dialogue groups have included people affiliated with the following organizations:

American Chemical Society
Chemical Manufacturers Association
Ciba-Geigy Corporation
Citizens for a Better Environment
Dow Chemical Company
Environmental Defense Fund

E.I. du Pont de Nemours and Co.
Environmental Law Institute
Environmental Mediation International
Exxon Chemical Company
Johns-Manville Company
Litton Bionetics
Mona Industries
Monsanto Company
Mount Sinai School of Medicine
National Association of Manufacturers
National Audubon Society
Natural Resources Defense Council
New Jersey Department of Environmental Protection
Procter and Gamble Company
Rohm and Haas Company
Shell Chemical Company
Sierra Club
Union Carbide Corporation
United Steelworkers of America
University of California

One invariant ground rule of the Foundation's dialogue group discussions is that no member of a group is at liberty to quote any other member without his/her explicit permission. Hence, we deliberately foster exchanges in which the participants are free to explore positions which may differ from their usual--or organizational--points of view, and also to change positions from time to time without loss of face or fear of being quoted, as the debate continues from one meeting to the next. In effect, the dialogue group process is facilitated by a phase in which we seek to establish a "safe" environment for free wheeling discussion. Of course, from time to time, visitors are invited to present background briefing sessions. But, particularly in the case of visitors from the regulatory agency--the Environmental Protection Agency in our dialogues to date--they leave after the briefing is completed. Our thought is that the members of dialogue groups will be more likely to truly engage each other in debate if the Agency people are not present; otherwise, there might be the temptation

for members to appear to speak to each other, but, in fact, to be presenting their views in a manner intended to convince the Agency. Building mutual trust in the group is an absolute essential. Thus, to avoid hidden or overt advocacy of fixed positions, which might polarize the group, we tend to favor closed meetings for dialogue groups--until a group position is developed, at which time written statements are prepared. Meetings are then held with the Agency and, if appropriate, larger public meetings are also convened to facilitate broader discussion of the issues and the group's consensus.

Facilitating the Process of Dialogue

In the Foundation's toxic substances dialogues, I usually serve as facilitator. This involves, in my view, a number of key functions.

First, it is desirable for the facilitator, who knows the capabilities of the process, to participate strongly in definition of issues, since there are many issues that are inappropriate for this kind of process. Also, issues that are appropriate need to be stated in ways that relate realistically to what this kind of process can achieve.

Second, it is essential to establish an atmosphere or tone of trust and credibility. This is achieved by periodic discussions with group members, with agency personnel, and others to straighten out misconceptions, keep goals in focus, and deal with any problems promptly--before they get out of

hand. Of course, during group meetings, the facilitator must take a non-directive, non-partisan approach.

Third, as mutual trust develops, the group can begin to face key difficult issues; yet sometimes it is necessary for the facilitator to present background papers or commentary which view the issues from new perspectives. Thus, it is also often essential for the facilitor--sometimes aided by research staff--to analyze policy options, or to summarize material provided by group members. The purpose of such work is to facilitate the dialogue process.

Fourth, it is necessary for the facilitator to set the stage for transmittal of the group's work product to others--particularly agency staff--in a manner that is most likely to be well received. This requires an understanding of the factors which the agency and others will emphasize in their consideration of the group's work product.

I have tended to think of these as facilitative rather than mediating functions, in order to emphasize the difference between this process and the very different kind of work known as "environmental mediation"--which deals with resolution of site specific disputes. On balance, I see no problem with using the term "regulatory negotiation" to describe what we have at The Conservation Foundation called "dialogue." Taking this view, the facilitator could be called a "regulatory mediator." However, by this or any other name, I believe, it is a difficult professional function. I hold the strong belief that compensation for regulatory mediators should not be tied to

$150 per day and $10,000 per year limits, as implied in the draft Resolution on Regulatory Negotiation--but should be at the same rate of compensation provided by government agencies for senior professionals in fields such as science and law. Further, regulatory mediators will need to spend much more time on the negotiation than group members; hence, I believe that the $10,000 limit is inappropriately low for the mediator.

On the other hand, the proposal in the Resolution that as much as $500,000 be available per commission appears to be an unnecessarily high figure, as judged by our experience to date. To illustrate, we spent about $55,000 on toxic dialogue activities during 1979 and about $41,000 during the first six months of 1980. (These figures do not include any honoraria and only minimal travel reimbursements for participants.)

Time Constraints

The process of dialogue is time-consuming and cannot be rushed unreasonably. In our experience, about six months to a year is required to complete the process on any particular issue. We have not, to this point, established any deadlines for dialogue groups, as is done in the draft Resolution on Regulatory Negotiation. Though we have no directly relevant experience, one can speculate that the use of reasonable time deadlines could have a salutory effect on the process.

Reports

Dialogue groups convened by The Conservation Foundation have, thus far, been based upon the premise that the product of the group activity is the consensus reached by the group. Whatever positions the group arrives at are released under its independent auspices, and not as a product of The Conservation Foundation. Also, there are significant, less tangible achievements even when the group serves mainly to clarify disagreements. Some members of the dialogue groups have stated that the insights they have gained, and the mutual trust and respect that have developed between people who in other forums hardly had spoken to each other, are in themselves valuable outcomes of the process.

Acceptance of Reports by Agencies

As presently constituted, the Foundation's dialogue groups on toxic substances issues have no formal channel by which to transmit their reports to EPA. By definition, we work at a pre-regulatory stage, and there is no obligation of the agency to take our reports into account. Nonetheless, we have always been well received by Agency staff and, with the helpful cooperation of the agency staff, have been learning how to introduce dialogue group reports to the agency so that they will be seriously considered. This is not an easy task, since there is no assurance that the agency will choose to give our reports any special weight simply because of the broad constituency

that came to agreement in their preparation. An agency always has its own agenda, based upon its own budget constraints and its own perceptions--which might, for example, emphasize positions and actions most easily defended by the Agency in the courts, rather than those which the dialogue group feels deserve priority attention.

In considering the Resolution on Regulatory Negotiation, it is my belief that revisions should be considered which emphasize the following:

o mechanisms which create a steering committee of people in business, public interest organizations, and government to select issues for attention (perhaps from a list which includes proposals solicited by public announcement), in an order of priority chosen by the steering committee, and limited to a small enough number of issues so that a regulatory negotiation can be funded for each issue selected.

o mechanisms which make it likely that the regulatory agencies will choose to act on the basis of the findings in reports of regulatory negotiating groups (or explain why such action is inadvisable and what alternative course it intends to take). Processes for giving this kind of stature to regulatory negotiation might be achieved by some kind of formal linkage between each regulatory negotiation and the relevant Congressional oversight committee.

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Illustrative Experience at The Conservation Foundation

The issues that have been addressed by toxic substances dialogue groups at The Conservation Foundation are:

- o the need for training additional toxicologists
- o guidelines for testing new chemical products
- o confidentiality of business information
- o dealing with low-volume chemical products
- o guidelines for notification to EPA of new chemical products
- o follow-up by EPA of new chemical products, after introduction into commerce.

The shaping of public policy issues is a slow process requiring continued attention over a long period of time. Thus, the full effect of this work is likely to continue to develop over the years ahead. However, some impact of these activities is already evident, as noted below.

Letters to EPA and HEW (supplemented by a Conservation Foundation report on training of toxicologists) served as catalysts leading the Civil Service Commission to consider the need for a separate Civil Service register for toxicologists--to provide a basis for career advancement that would encourage these scarce professionals to enter government service.

A Conservation Foundation dialogue group report on guidelines for testing new chemical products has been widely discussed and cited. This report appears to have been one of the seminal pieces of work which set the stage for present discussions on testing guidelines for new chemicals in EPA and internationally.

In an attempt to deal with the tension between confidential treatment of business information and the interest of the public in knowing this information when it may shed light on the potential adverse effects of chemicals, a dialogue group was formed to focus on this issue. After several meetings, the group decided that the issue was too divisive to be faced at that time, yet felt it was important and should be considered. It will undoubtedly be reviewed again by the steering committee as a possible agenda item.

In another instance, the steering committee selected as a topic the reporting requirements for new chemicals expected to be produced in small quantitites, i.e., chemicals for which substantial testing and reporting requirements would, in many instances, impose costs that could not be supported by limited product sales volume, and for which the reporting requirements would, therefore, have an anti-innovative effect. The dialogue group developed a consensus report which stated: "We believe the problem is not how to deal with 'small quantities' but how to deal with new chemicals for which small quantities also mean low risk. The problem is more usefully stated in terms of seeking to define 'conditions of presumed low risk,' i.e., conditions of toxicity, production volume, use, etc., within which risk is presumed to be of lesser concern." EPA has not as yet dealt fully with this issue, and it is in many ways intertwined with the two dialogue groups topics (new chemical notification and follow-up by EPA) which were next faced.

A dialogue group on new chemical notification met a few times. Then the steering committee decided that recent developments (pending in EPA) on this issue made it desirable to postpose further dialogue group discussions on this subject. The steering committee's recommendation was accepted by the new chemical notification dialogue group, and the matter will be reconsidered this fall.

A dialogue group on follow-up (by EPA) to new chemical notifications has recently come to a consensus position, which was transmitted to EPA last Friday. The letter of transmittal and consensus position (appended as Exhibits I and II), though dealing with a detailed and technical regulatory subject, do illustrate the kind of conclusion that can be expected from this process. In the consensus position, the actionable points are items 2 and 6. In item 6, parts (a) through (c) describe agreements, while part (d) sets out the boundaries of a limited area within which there was no consensus.

Conclusions

In my view, regulatory negotiation will make a real contribution only if it is perceived by all as an effective process. This means that it is critically important to establish a good track record. Issues should be selected which in fact can be dealt with by this process. A mechanism should be established which permits negotiations to be discontinued at an early stage if it becomes evident that an issue has been selected which cannot be handled successfully. Care and sensitivity should be

used in selecting participants, with an eye to conference participation skills as well as a balanced representation of points of view. A means should be found, if possible, that permits the negotiating group to protect its privacy so that members can explore new points of view with each other in a relatively unthreatening environment. Finally, linkages should be established, with Congress and relevant regulatory agencies, of a nature which make it likely that the reports of negotiating groups will be given favorable consideration.

In closing, I should like to express my appreciation for this opportunity to participate in these hearings, and express support in principle for the draft Resolution on Regulatory Negotiation. I hope that my comments will be helpful in your consideration of modifications of the resolution that may make it even more likely to be a useful instrument.

The Conservation Foundation
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July 25, 1980

Mr. Steven Jellinek
Assistant Administrator
Office of Pesticides and Toxic Substances
Environmental Protection Agency
Room 637, East Tower
401 M Street, S.W.
Washington, D.C. 20460

Dear Mr. Jellinek:

I am enclosing on behalf of the members of the Follow-up Reporting Dialogue Group 'A Consensus Statement' which the group produced. The dialogue group believes that the areas addressed in this statement are important and should now be incorporated into the Environmental Protection Agency's policies regarding premanufacture notification follow-up decisions under TSCA. The Dialogue Group Steering Committee endorses the dialogue group's work and approves the submission of the results to you.

As you know, the Follow-up Reporting Dialogue Group consists of members affiliated with the chemical industry and with public interest organizations. The dialogue group, to date, has held five meetings to discuss the issues relevant to follow-up decisions under TSCA. During the discussions which led to the attached Consensus Statement, the group dealt with many matrices for evaluating follow-up reporting options and took into account a wide range of views. Many facets of the subject were debated in considerable depth, including: specific kinds of toxicological information, adequacy of information, routes of exposure, and degree of control over exposure. The group also recognized the impact and interrelationship of the administration of the premanufacture notification review process on the selection of possible follow-up action strategies. The group further recognized that, after deciding on the general type of follow-up action (e.g., a SNUR) which is appropriate, it is also important to decide upon the specific form and extent thereof. In addition, the dialogue group compared possible strategies under TSCA with the basic mechanism set forth by the EC's Sixth Amendment.

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The Consensus Statement itself does not cover all the issues discussed by the group. Neither is the Consensus Statement intended to represent an exhaustive list of the issues which EPA must face. Rather, it deals with a few issues on which we reached consensus and it provides, we believe, a useful context for follow-up action to premanufacture notifications under TSCA. The significance of the Consensus Statement is that it represents the joint thinking of diverse interests regarding a common concern.

The implications of follow-up policies under TSCA are important to many sectors of society; the members of the dialogue group, therefore, greatly appreciate the opportunity to have a meaningful input into your consideration of these matters. The Consensus Statement in its entirety presents key parameters upon which a systematic and rational follow-up action mechanism can be based. The members of the dialogue group believe that the approaches described in the statement are worthy of careful consideration. They submit the enclosed result of their efforts with the ho e that it will provide the basis for follow-up policies under TSCA.

With thanks to you and your staff for your continued support of the group's efforts,

Sincerely,

Sam Gusman
Senior Associate
The Conservation Foundation

On behalf of the Follow-up Reporting Dialogue Group:

Eugene Berman (Co-chairperson)	E.I. du Pont de Nemours Co.
A. Blakeman Early (Co-chairperson)	Sierra Club
Jack Braitmayer	Mona Industries
Devra Davis	Environmental Law Institute
Sam Gusman	The Conservation Foundation
Robert L. Harness	Monsanto Company
Thomas W. Mooney	The Procter and Gamble Co.
Nancy Othmer	Natural Resources Defense Council
Curtis W. Smith	Shell Chemical Company
Jacqueline M. Warren	Environmental Defense Fund

Meredith Golden, The Conservation Foundation staff to the dialogue group

cc: Edwin H. Clark, III

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July 25, 1980

A CONSENSUS STATEMENT BY A DIALOGUE GROUP
ON FOLLOW-UP REPORTING

1. For the purposes of proposing follow-up action decisions, we will assume that the information submitted in an unchallenged PMN has been judged by EPA to be sufficient to indicate that the specified chemical does not present an unreasonable risk for the use and production volume described in the PMN.

2. The initial follow-up action decisions for new chemicals should be made by EPA at the close of the PMN review period and should be based on the information provided in the premanufacturing notification and also from other sources readily available to EPA which may be relevant to the PMN as submitted and to the future commerce of the chemical, including consideration of significant new uses. Decisions to use any section of TSCA for follow-up action should be made promptly available to the public and implemented expeditiously.

3. In developing an effective approach to follow-up action, it is necessary to think in terms of 'public policy' rather than science alone. It would be necessary on scientific grounds per se to consider all possible health/environmental effects and broadened exposures in the determination of appropriate follow-up actions. This approach, however, is currently infeasible, considering limited resources.

4. The factors to be considered for follow-up action are, for example, changes in routes or levels of exposure, use changes, volume increases, or development of new effects information.

5. There are several types of follow-up decisions which can be taken under TSCA, including: no action, significant new use rules (Section 5(a)), general recordkeeping and reporting rules (Section 8(a)), significant adverse reactions recordkeeping (Section 8(c)), health and safety studies submission (Section 8(d)), testing rules (Section 4), and regulation (Section 6).

6. The following generalizations indicate the type of follow-up decisions which should be considered:

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a) To the extent that it is readily apparent from the nature of the chemical that exposure significantly beyond that described in the PMN is unlikely, no follow-up action would be indicated;

b) To the extent it is uncertain whether such broadened exposure will occur, follow-up designed to show changes in use and exposure patterns may be indicated. This would lead to 8(a) action presuming there is no basis of concern due to 'red flag' toxicological information or the absence of toxicological information;

c) To the extent there is a probability of such broadened exposure as a consequence of a new use and a basis for concern, due to 'red flag' toxicological information, a SNUR may be appropriate;

d) To the extent that there is a probability of such broadened exposure and a basis for concern due to the absence of toxicological information, the group agreed that general criteria for necessary information must be based upon both technical and policy considerations. There is no 'social contract' or 'public policy' in TSCA setting forth these considerations for either the original PMN and/or follow-up thereto. In view of this absence, some felt that 8(a) would be appropriate and others felt that a SNUR would be appropriate. The question whether there would be a 'social contract' or 'public policy' is a basic question which must be analyzed in the context of the PMN programs generally and this question could not be addressed in the limited context of follow-up to a PMN.

(PMN - Premanufacturing Notification; SNUR - Significant new use rule; TSCA - Toxic Substances Control Act.)

Mr. GUSMAN. I suppose that the reason it was appropriate to separate my remarks from those of the others is simply that our project has been independent though concurrent with the National Coal Policy Project. Our project at the Conservation Foundation has dealt with toxic substances issues, a different subject matter, but we've had to deal with many of the same kinds of problems of the regulatory process that already have been discussed during this morning's testimony.

Our hypothesis is that some of the most desirable policy options are not explored during the regulatory process and do not get on the public agenda because the regulatory process encourages each party, from the start, to express itself as forcefully and skillfully as possible. And, with each party advocating its own gain to decision-makers in the regulatory agency, there is a tendency for coalitions to develop that on environmental issues at least, generally appear to involve business representatives on the one hand, and a consortium of labor and public interest groups on the other. Neither side generally puts very much effort into communicating with the other side, since each accepts its role as an advocate in an adversarial process where the power to make decisions is vested in the regulatory agency. In conversations during 1976, we explored whether some progress could be made in bringing traditional adversaries together for clarification of disagreements and search for hidden areas of agreement. With few exceptions, the people that I spoke with said, "it probably won't work, but include me if you decide to try it." So during November of 1976, I invited eight people to a 1-day meeting for a discussion of two questions. First, "are you satisfied with the current mode of dialog between businessmen and environmentalists on public policy issues in Washington, and if not, do you want to participate in an on-going discussion intended to clarify disagreements and search for areas of agreement."

People were invited to attend as individuals, and not as official representatives of their organizations. And no one refused. Those who attended were affiliated with a wide variety of both business and environmental organizations. The meeting was, from my point of view, a resounding success in the sense that we were clearly encouraged to proceed and, in effect, that meeting became the first of a series of meetings which continue to this day. We used a small group format, and to the present, our activities involve participation by people in small groups where they can most easily learn to deal with each other as individuals.

We soon recognized some general criteria for selection of issues. First, the issue should be at an early stage of development before positions publicly taken become difficult to disavow. And, second, the issue should be perceived as inevitable by all, so that it could not be avoided by simply not paying attention to it. Only a limited fraction of regulatory issues meet these criteria. In effect, our focus is directed at issues before the agency starts to write regulations, yet after it is clear to all that the issue must be dealt with. For some issues, this can be a very narrow window.

Toxic substances control issues were chosen initially for several reasons. First, the Toxic Substances Control Act was enacted in late 1976, about the time we got started. Moreover, knowledge of

toxic regulatory issues was not widespread, nor were public positions or institutional commitments yet fixed.

In the first few years, the toxic dialog group met every other month. But, more recently, it has become a steering committee and meets only every 6 months to provide general advice and guidance on the activities of a series of dialog groups that are convened to deal with particular issues. The steering committee and each of the dialog groups are usually comprised of about 10 to 14 people, about half from industry and the other half, at the start, affiliated with environmental groups. More recently, labor has been included and soon someone affiliated with a consumer group will be included. Each person, as I mentioned, participates as an individual, though of course each is chosen for membership because of affiliation with, and influence in, an organization that actively participates in public policy debate. My written remarks contain a list of the organizations with which participants have been affiliated.

One invariant ground rule of our dialog group discussions is that no member of the group is at liberty to quote any other member without his or her explicit permission. Hence, we deliberately foster exchanges in which participants are free to explore positions which may differ from their usual or organizational points of view and, also, to change positions from time to time without loss of face or fear of being quoted as debate continues from one meeting to the next.

In effect, the dialog group process is facilitated by a phase in which we seek to establish a safe environment for freewheeling discussions. Of course, from time to time, visitors are invited to present background briefing sessions, and these sessions have a different character.

Thus, we tend to favor a phase of the process involving closed meetings until a group position is developed, at which time written statements are prepared. Meetings are then held with the agency and, if appropriate, larger public meetings are also convened to facilitate broader discussion of the issues and the group consensus.

Turning briefly to the role of the facilitator, first, we believe that it is desirable to have a facilitator, one who knows the capabilities of the process. It is our experience that it is helpful to have the facilitator participate strongly in the definition of issues since there are many issues that are inappropriate for this kind of process. Second, it is essential to establish an atmosphere or tone of trust and credibility. It is important for the facilitator to be viewed as reliably neutral and facilitative while taking in a leading role in the group. Third, it is necessary for the facilitator to set the stage for transmittal of the group's work product to others, particularly to agency staff, in a manner that's most likely to be well received. This requires an understanding of the factors which the agency and others will emphasize in their consideration of the group's work product.

I've tended to think of these as facilitative functions. On balance, I see no problem in using the term "regulatory negotiation" to describe what we've tended to call dialog. Taking this view, the facilitator could be called a regulatory mediator. However, by this or any other name, I feel it is a difficult professional function and hold the belief that the compensation for regulatory mediators

should not be limited to $150 a day and $10,000 per year, as implied in the draft resolution on regulatory negotiation. But should be at the same rate of compensation provided by Government agencies or senior professionals in such fields as science and law. Further, regulatory mediators will need to spend much more time on the negotiations than group members, so I would suggest that the $10,000 limit is inappropriately low for the mediator. On the other hand, the proposal in the resolution that as much as $500,000 be available per "commission" may be an unnecessarily high figure as judged by our experience to date. To illustrate, we spent about $55,000 on toxic dialog activities during 1979 and $41,000 during the first half of 1980. These are not truly comparable with the $500,000 figure in the sense that we have not given honoraria and have had only minimal travel reimbursements for participants.

With respect to time constraints, let me just mention that the process is time consuming and really cannot be rushed unreasonably. In our experience, about 6 to 12 months are required to complete the process for a particular issue.

The dialog groups convened by the Conservation Foundation have thus far been based on the premise that the product of the group activity is the concensus reached by the group. And, whatever positions the group arrives at are released under its independent auspices, not as a product of the foundation. Also, as noted during the earlier testimony, there are significant less tangible achievements even when the group serves merely to clarify. Some members of the dialog group have stated that the insights they have gained and the mutual trust and respect that has developed among people who in other forums hardly speak to each other are in themselves very valuable outcomes.

One of the issues of overriding importance is the acceptance of group reports by the agencies. As presently constituted, the Foundation's dialog groups on toxic substances have no formal channel by which to transmit reports to EPA. By definition, we work at a preregulatory stage and there is really no obligation for the agencies to take our reports into account. Nonetheless, we have always been well received by agency staff and with their helpful cooperation, have started to learn how to introduce our reports to the agency so they'll be seriously considered. This is not an easy task as there is no assurance that the agency will choose to give our reports any special weight simply because of the broad constituency that came to agreement in their preparation.

In considering the draft resolution on regulatory negotiations, it is my belief that revisions should be considered which emphasize two kinds of mechanisms. First, perhaps mechanisms could be emphasized which create a steering committee of people in business, public interest organizations and government to select the issues for consideration by commissions. This might, of course, be done from a list which includes proposals solicited by public announcement, but in an order of priority chosen by the steering committee and limited to a small enough number of issues so that a regulatory negotiation could be funded for each issue selected. The sense of this mechanism would be to provide a prioritization scheme of some sort.

Second, perhaps mechanisms could be considered which make it likely that the regulatory agency would choose to act on the basis of the findings in reports of the regulatory negotiation groups, or explain why such action is inadvisable and what alternative courses of action the agency intends to take. In my written testimony, I've suggested that processes of this kind might be achieved by some kind of formal linkage between each regulatory negotiation and the relevant Congressional Oversight Committee.

The issues that we have addressed in toxic substances dialogues at the Conservation Foundation are described in my written remarks. The most recent of these has dealt with follow-up actions, after evaluation by the Environmental Protection Agency of notices it receives from prospective manufacturers of new chemicals. A consensus position on this subject was transmitted to EPA last Friday. The letter of transmittal and the consensus position are appended to my written remarks as exhibits 1 and 2. Though somewhat technical in nature, the exhibits do illustrate the kind of conclusions that can be expected from the process as we use it. There are actionable points describing areas of agreement and, also, equally important in some respects, there is in one instance a statement which illustrates a manner of defining the boundaries of a limited area within which there was no consensus. In that area, the lack of consensus needed to be stated so that all could understand where there was agreement and where agreement could not be achieved.

In conclusion, in my view, the regulatory negotiation process can make a real contribution only if it is perceived by all as an effective process. This means that it is critically important to establish a good track record. Issues should be selected which, in fact, can be dealt with by the process, and a mechanism should be established which permits negotiations to be discontinued at an early stage if it becomes evident that an issue has been selected which cannot truly be handled successfully. Sensitivity is needed in selecting participants, with an eye to conference participation skills as well as balanced representation of points of view. A means should be found, if possible, that permits the negotiating groups to protect its privacy so that members can explore new points of view with each other in a relatively unthreatening environment. And, finally, linkages might be established with Congress and relevant regulatory agencies of a nature which makes it likely that the reports of negotiating groups will be given favorable consideration.

In closing, I would like to express my appreciation for this opportunity to participate in these hearings and express my support in principle for the draft resolution on regulatory negotiation. I hope my comments will be helpful in your consideration of modifications that may make it even more likely to be a useful instrument.

Senator LEVIN. Thank you very much, Mr. Gusman.

You indicated that—well, before I get to that, what is the Conservation Foundation? Please give me a few seconds worth of information on that. I'm not familiar with it.

Mr. GUSMAN. It's a nonprofit research and communication organization in Washington. Its stated primary purposes are to improve the quality of the environment and promote wise use of the Earth's resources. The foundation does its work by conducting interdisci-

plinary research and communicating its views and findings to policy makers and opinion leaders. It was founded in 1948 and since then has been characterized by a balanced point of view that recognizes the importance of a healthy social and economic climate to the achievement of conservation goals. It does not have members and it is not a lobbying organization.

Senator LEVIN. How did you happen to get involved in this particular effort?

Mr. GUSMAN. I am a scientist by training, a chemist by training with experience in industrial research and general management and some experience with regulatory affairs. I saw the regulatory process close at hand here in Washington, and for the reasons that I mentioned in my remarks dealing with lack of communication between groups, I saw a need and decided to explore possible avenues for improving this kind of communication.

Senator LEVIN. So, you on behalf of the foundation initiated this?

Mr. GUSMAN. I did this as an individual and very soon came into contact with the foundation. The foundation, at the same time, had been exploring the same subject, and during 1975, it established a program entitled "Business and the Environment," funded by foundations, to explore avenues for improved communication between business groups and environmental groups. It was during 1976 that this all came together and the dialog project was started.

Senator LEVIN. Do you have any comments on the question of how close this process should be to the agency which is in the midst of writing regulations?

Mr. GUSMAN. What we have done is to have very extensive discussions with the agency before we start a dialog to explore whether there is the possibility that the subject will be actionable in the agency. So, informal discussion, to make sure that we understand the agency's interest in the various regulatory subjects and bring this information to the dialog groups, is one of the kinds of connections that we have used. Once a dialog group is formed on a particular subject, we have not had agency people as observers in it. We've kept the process separate, though occasionally asking agency people to come as visitors to give briefings and be asked questions.

Senator LEVIN. Do you seek to have the recommendations of those dialog groups available before the proposed rules are published?

Mr. GUSMAN. Yes.

Senator LEVIN. That is what I gathered from your testimony.

Mr. GUSMAN. Absolutely, yes.

Senator LEVIN. What would happen if they weren't ready. You indicated also time is critical, to have enough of it, and you can't rush this process particularly. Now, what happens if there is a proposed regulation that's published before your dialog group is finished? Would that deter you, or deflect you from completing this work?

Mr. GUSMAN. In one instance it has deflected us. There is one dialogue group we've formed and then, for the moment, shelved because we see the agency starting to prepare a statement for the Federal Register, and while that it going on, it seemed to us less likely that the dialog group would choose to reach a consensus

since consensus would then have to be presented in an environment where the agency would have already taken a position and organizations would be considering their responses to it. So we've tended not to want to continue dialogs through or into a period where agency action has occurred.

Senator LEVIN. How many recommendations or how many different occasions have been forwarded to the agency by your group; just approximately. Is it relatively few?

Mr. GUSMAN. It is a handful.

Senator LEVIN. Are you able to trace results?

Mr. GUSMAN. Yes, we can trace results, but in almost all instances, we're dealing with subjects where there are many inputs into the agency and it's not possible to state that the outcome is due to the particular action that we've initiated. Nonetheless, when the final action by the agency is very similar to what was presented in a dialog group report, that gives us some belief that our reports were at least taken into account.

Senator LEVIN. Has there ever been an occasion where the agency delayed publishing a proposal in order to wait for your recommendations?

Mr. GUSMAN. No.

Senator LEVIN. Do you perceive that that might happen?

Mr. GUSMAN. It might happen.

Senator LEVIN. What dangers would you perceive if it did happen? I see some that are obvious to my question. Do you see any dangers if an agency said to itself, "well, we're ready to publish, but the dialog groups seems to be a good group of folks, they know what they're doing, let's hold off a month and get their input."

Mr. GUSMAN. That, frankly, had never occurred to me because I had never seen the process as powerful enough to cause that to happen. I tend to feel that the problem is at the other end. The agency has its own process at the preregulatory stage. Bringing outside views into a process by agency people is a strictly voluntary activity on their part. However, I must agree if a dialog process or a "commission" report became so powerful that it would overwhelm the agency process and be a key element of their decision-making, excluding other inputs, that would be a problem.

Senator LEVIN. Even if it didn't exclude other inputs perhaps it would appear to have an undue impact. Would you say that that would be a problem?

Mr. GUSMAN. Yes.

Senator LEVIN. I don't want to lead you in any particular direction, but I express my concern about the appointment of this group by the agencies for that reason. Do you have any such concern as to that or do you feel that that's more of an appearance problem than a reality problem?

Mr. GUSMAN. Well, it is in part for that kind of reason one could consider the formation of a steering committee, involving Government people, public interest people, and business people who would be involved in the selection of issues and perhaps also in the selection of participants.

Senator LEVIN. Across-agency line?

Mr. GUSMAN. Perhaps. Some of the issues that we deal with have a bearing on the Occupational Safety and Health Administration, the Food and Drug Administration, and other agencies. It could be that there are clusters that could be established.

Senator LEVIN. How about the role of the facilitator or mediator. You draw distinction in your testimony, I was trying to follow, between the two roles, which is, I think, something that I was attempting to get at before and I don't know how well thought out it was. I haven't really given a lot of thought until reading the testimony this morning concerning the problem of the mediator in the usual sense. Is there anything you would like to expand on that in light of the testimony earlier this morning and in light of my questions on that issue whether or not there are some problems that could be created beyond what you've testified through having a mediator rather than having what you call a facilitator?

Mr. GUSMAN. I was really not trying to play with words in making a distinction between facilitator and mediator. I was rather noting that in the regulatory process, there is an open ended number of participants. It is not possible to mediate an issue to a conclusion in the same sense as a labor management mediation or a site specific land use environmental mediation, where all the participants are sitting around a table. In the regulatory scene, only some of the participants are sitting around the table in any dialog group or commission. There will be other people, not at the table, who will not necessarily agree. So, to call the process a mediating process troubled me to the extent that one might read into it the implication that when a commission report issues or a dialog group report issues, that it truly represents a consensus of all possible points of view. That implication I do not believe is true. There will always, in this arena, be somebody else who may have a different view that needs to be taken into account.

I might add that we found the facilitator does play a substantial role outside of the formal group meetings. If for example, group consensus is not developing, the facilitator may take the initiative in doing some background research to put on the table possibly innovative or novel new approaches which can better accommodate the interests of the parties. It is not simply a role that occurs while meetings are in progress, facilitating a discussion.

Senator LEVIN. I think the use of the term "mediator" of that function would tend to produce a more adversarial atmosphere than what everyone has described here this morning; more advocacy to try to persuade the mediator in some sense of the correctness of the position. Even though a mediator is not an arbitrator, nonetheless there is that tendency to make one's case the best one can to the mediator. I think that really is not the role that folks perceive for this kind of mediator. I think, therefore, we should avoid that implication and seek not only a different word that describes it as you have, but a different role as apparently everybody has. How much money would you estimate was spent to develop recommendations to the Toxic Substances Control Act? Can you give us some economics?

Mr. GUSMAN. You mean by our dialog groups?

Senator LEVIN. Yes, salaries, perhaps your salary, how many days were spent, so we could translate that into dollars in terms of this resolution.

Mr. GUSMAN. I have mentioned some total figures per year in my comments.

Senator LEVIN. Is that in your testimony? I may have missed that.

Mr. GUSMAN. Yes. They are considerably less than the $500,000 figure that is cited per commission in the draft resolution. The dialogue activity at the Conservation Foundation is not a full-time activity for any person. I spend part of my time on this. Some other people spend part of their time. We tend to select participants who are either local here in Washington, or come from relatively close cities like New York, in large part because the people we know who are most knowledgeable about these regulatory issues are often clustered in this part of the country. Economics do play a role. We tend to want to keep costs down. But I'm not convinced that our policy of paying no honoraria would be an appropriate one for a commission. It would probably be inappropriate, so I think that our costs are for that reason, lower than would be the case for a government funded regulatory commission. Also the geographical distribution of participants would probably lead to higher travel costs.

Our expenditures during 1980, first half, were about $41,000. This was a period of relatively high activity for us where we had two specific topics under discussion and a number of meetings. I don't have the exact number in my mind, but I would say that every 4–8 weeks there was a meeting of one or the other of these two groups, and professional staff time behind that.

Senator LEVIN. What about per diems?

Mr. GUSMAN. For the participants?

Senator LEVIN. Yes.

Mr. GUSMAN. There were no per diems for the participants in our program.

Senator LEVIN. But, for this resolution you recommended travel expenses, plus the mediator you believe should not be limited to $10,000 per year.

Mr. GUSMAN. Right

Senator LEVIN. Depending on the number of panels that are set up by an agency, depending upon the number of different regulatory schemes that is involved, this could easily get up to $500,000. Of course, that is not per agency, that is per panel. Even per panel, I'm wondering, what is an optimal number per panel, 8–10–12 people maybe, a few more?

Mr. GUSMAN. Perhaps.

Senator LEVIN. You add up per diems for that and travel expenses and honoraria, I'm wondering whether that is too high. It strikes me too as being high too, but I just haven't gone through the math. Have you gone through the math, of adding up on one panel, let's say of 10–15 people's per diem, travel expenses, honoraria for experts, mediators cost? Have you worked through that at all?

Mr. GUSMAN. No, I haven't worked through it in that sense. The thrust of my comment went to the fact that there are, as noted in

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the National Coal Policy Project, some people, usually from industry, who would not request per diems if the policy were established that per diems would only be paid if requested. So, one could establish policies which would not necessarily involve per diems for all the participants. My question about the $10,000 limit was solely with respect to the mediator or facilitator, not with respect to the other people.

There is also the question of how many meetings would be required in order to come to conclusions. I was struck by the thought in the draft resolution, favorably struck by it, of having a time deadline, a reasonable time deadline. While we have not done that, I think it is an interesting concept.

Senator LEVIN. Could you give us the number of hours that were put in for this project by all the participants?

Mr. GUSMAN. No, I don't have that information.

Senator LEVIN. Is that possible to do without a great deal of trouble? Could you tell us how many meetings there were over what period of time?

Mr. GUSMAN. I could get that information for let's say, the first half of 1980, quite easily and one could project on that.

Senator LEVIN. That would be useful if you could divide it up by project.

Well, we are grateful that you came.

[Subsequent information was received and follows:]

July 30, 1980

Summary of Expenses* for the Toxic Substances Dialogue Project
for the First Half of 1980

(The Conservation Foundation)

	Total Expense	Expense per day of dialogue group meetings (including expense of preparation and background research)
Number of days of dialogue group meetings (about 12 people per group; meetings held in Washington, D.C.)	9 days	one day
Staff time (including preparatory work by senior staff, research associates, and secretarial staff)	$36,150	$4,016
Other Expenses		
Honoraria for group members	0	0
Meeting expenses, including travel for participants	2,400	267
Duplicating, Telephone, Postage, staff travel, etc.	2,450	272
TOTAL	$41,000	$4,555

* Salary expense items include benefits and related, indirect expenses. Other expense items also include indirect expenses.

Senator LEVIN. There is a question here that staff suggests that I ask now and I would be happy to do that. You emphasized in your testimony that the representation was individual rather than company representation. Could you give us the advantages and disadvantages of that?

Mr. GUSMAN. The principal advantage that we had in mind is to promote open exploration of new positions in the discussion groups without having each person obligated to go back to an organization and get organizational agreement before a position could be agreed to. So, we visualized a sense of flexibility and a greater willingness, perhaps, of people to come to agreement. We had no illusions, however, that people would take positions that are grossly at variation with those that would be acceptable within their parent organizations.

Senator LEVIN. I take it you would be surprised to find organization in a public comment on a rule taking a very different position from the position taken by the individual who happened to work for that company a year earlier.

Mr. GUSMAN. I would not be too surprised if that were to occur. The concensus statements that develop have value, it seems to me, only to the extent that they are accepted by an agency. If the agency doesn't act, if several years go by before a conclusion is reached, if in the meanwhile there has been polarization that developed on the issue, I would not be surprised to see the conclusions of the dialogue groups cease to have validity over a period of time.

So, for that reason, timing really has a significant importance, in my belief.

Senator LEVIN. Mr. Gusman and all the other members of the other panels who participated, we're very happy you came forward this morning and grateful for your testimony. Tomorrow morning we'll meet at the same place. We're meeting here tomorrow at the same time, 9:30. We'll be hearing from Mr. Roy Gamse, Deputy Administrator for Planning and Evaluation of the EPA and from Mr. Peter Petkas, Director of the U.S. Regulatory Council, and Mark Schultz of the U.S. Chamber of Commerce, tomorrow.

One thing I didn't ask the other witnesses this morning and will ask you, if you know of people who are negative about this concept, who don't like it, who might be willing to come forward, we would like to hear from them. We haven't been able to dig up too many of those, which either means that regulatory negotiation is a great concept, that there are no opponents, or that there may be some other reasons we can't imagine. But, do you happen to know of anybody who's looked at this and how it works and thinks it would be a mistake to in some way promote it through this kind of institutionalization which is projected in this resolution?

Mr. GUSMAN. I don't have anyone to suggest right now, but if someone occurs to me, I'll mention it to staff.

Senator LEVIN. Thank you again, and we will stand now at recess until tomorrow morning.

[Whereupon, the committees were recessed at 12 noon.]

REGULATORY NEGOTIATION

WEDNESDAY, JULY 30, 1980

U.S. SENATE SELECT COMMITTEE ON SMALL BUSINESS, AND THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS,

Washington, D.C.

The committees met, pursuant to call, at 9:30 a.m., in room 424, Russell Senate Office Building, Hon. Carl Levin presiding.

Present: Senators Nelson, Levin, and Boschwitz.

Senator NELSON. The hearing will open here this morning. Our three witnesses this morning—one of them from the Environmental Protection Agency, Mr. Roy Gamse, Deputy Assistant Administrator for Planning and Evaluation of the U.S. Environmental Protection Agency, and Ms. Kate Beardsley, Deputy Director of the U.S. Regulatory Council. If you would come to the witness stand and appear together, we would appreciate it.

Our other witness, who will follow, is Mark Schultz, attorney for regulatory affairs, United States Chamber of Commerce.

The Finance Committee is conducting hearings this morning on some matters for which I must be present. Senator Levin will conduct the hearing this morning. Please identify yourselves for the record. Senator Levin will chair the hearing.

STATEMENT OF HON. CARL LEVIN, A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator LEVIN. Thank you, Senator.

Before you do identify yourselves, I have a brief statement. Today is the second day of 2 days of hearings on regulatory negotiation conducted jointly by the Senate Small Business Committee and the Subcommittee on Oversight of Government Management of the Governmental Affairs Committee. I am pleased to join with Senator Nelson in chairing these hearings. There are other Senators who may be able to get here this morning as well.

Regulatory negotiation is a process where interested and often opposing sides on an issue come together to try to work out their differences, usually regarding environmental, health and safety issues. This is done in a setting that maximizes the free exchange of ideas and views, sometimes using a facilitator to assist in the process.

The premise of regulatory negotiation is that, given a setting where parties can come together in nonadversarial relationships, an agreement is more likely to be reached and common views discovered.

At yesterday's hearing we heard how the regulatory negotiation process worked for the three participants in the coal project, and from a representative of the Conservation Foundation which has sponsored negotiations on the implementation of the Toxic Substances Control Act. A number of questions were raised concerning the mechanics of the process, which we hope to explore further today. Among them were public participation in the process, whether the negotiations should be open to the press and the public, the role of the facilitator, Federal agency involvement, and what is the most appropriate time to use regulatory negotiations vis-a-vis the regulatory process.

Today's witnesses will present further testimony on regulatory negotiations. Senator Nelson has already told us who they will be. Now, perhaps, you could tell us who is who.

STATEMENT OF ROY N. GAMSE, DEPUTY ASSISTANT ADMINISTRATOR FOR PLANNING AND EVALUATION, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. GAMSE. Mr. Chairman, I am Roy Gamse, Deputy Assistant Administrator for Planning and Evaluation of the U.S. Environmental Protection Agency. Doug Costle, the EPA's Administrator, asked me to appear in his place, to comment on your proposed resolution concerning regulatory negotiation. Also, I have with me Nel Minero from our Office of General Counsel to help me answer questions.

We at EPA welcome your interest in reforming the way agencies take into account the opinions and problems of people affected by regulations. We think of ourselves as leaders in that field. At the conclusion of my statement on regulatory negotiation I would like to briefly sum up EPA's efforts to account for the potential burdens our regulations impose on the business community and provide some materials for the record.

We are committed to a regulatory reform program which yields regulations which are more cost effective and more responsive to the needs of those who are regulated as well as those who benefit from regulation. An essential ingredient of effective regulatory reform is enhanced communication with all affected parties, and that is what we think regulatory negotiation has most to offer.

Senator LEVIN. Let me interrupt you, Mr. Gamse, if I can. You have got a 13-page statement here. If you can summarize it, we would appreciate it and your entire statement will be printed in the record at this point.

[The prepared statement of Mr. Gamse follows:]

STATEMENT OF
ROY N. GAMSE
DEPUTY ASSISTANT ADMINISTRATOR
FOR PLANNING AND EVALUATION
U.S. ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE
SELECT COMMITTEE ON SMALL BUSINESS
AND THE
SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT
OF THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
July 30, 1980

Mr. Chairman and Members of the Committees: I am Roy N. Gamse, Deputy Assistant Administrator for Planning and Evaluation of the U.S. Environmental Protection Agency. Douglas Costle, the Administrator of EPA, has asked me to appear in his place, to comment on your proposed resolution concerning "regulatory negotiation."

We at EPA welcome your interest in reforming the way agencies take into account the opinions and problems of people affected by regulations. We think of ourselves as leaders in that field. At the conclusion of my statement on regulatory negotiation I would like to briefly discuss EPA's efforts to account for the potential burdens our regulations impose on the business community. We are committed to a regulatory reform program which yields regulations which are more cost-effective and more responsive to the needs of those who are regulated as well those who benefit from

the regulations. An essential ingredient of effective regulatory reform is enhanced communication with all affected parties, and that is what regulatory negotiation has most to offer.

We have had some limited experience with regulatory negotiation, although the form differs from that proposed by your resolution. Our experience may further understanding of how regulatory negotiation works and what its potential benefits might be.

EPA was involved in the National Coal Policy Project, in which more than 60 participants from coal-mining, coal-using, and environmental groups met to discuss how and where coal should be mined and burned, and how it would be transported, priced and conserved. The major achievement of the project was the environmentalists' acceptance of streamlined utility licensing and siting procedures. This breakthrough meant an enormous decrease in the potential for delay caused by technical and procedural challenges to construction by utilities. In exchange, the industry representatives promised to notify the public before applying for power plant licenses, and to support public financing of qualified public interest groups' participation in hearings. The parties found that they could focus on

resolving substantive issues instead of using procedural battles in court to delay projects. EPA served as a coordinator and partial sponsor of the National Coal Policy Project, and we are proud of the step forward that it represents.

A drawback to that project, however, was its failure to include all of the significant parties. For example, there were no consumer or Indian representatives on the group. Mediators should be appointed at the outset of negotiations and the mediator should be given at least 30 days to determine whether all of the significant parties are willing to participate and whether they can agree on how to proceed.

The issue of asbestos-containing materials in schools provides another example of how open communication and negotiation prior to regulation can help in resolving regulatory conflicts. The EPA Office of Pesticides and Toxic Substances (OPTS) initiated a technical assistance program for states and school districts to identify friable asbestos-containing materials and suggest corrective actions. We began this effort by surveying states to find out what they were doing about asbestos in schools and requesting that each Governor name a state asbestos coordinator. We discussed the need to regulate and the possible shape of regulations, if needed, with non-Federal

government groups and individuals, who would be affected by our actions. In developing our technical assistance guidance document, we solicited comments from many individuals and groups, we advertised the program through PTA's, and the National School Board Association, and we contributed to an article in the School Board Journal. We have found that regulations are necessary, and our approach and the guidance we give those who will be affected reflects the results of these early efforts.

A third experience is closer to the kind of process your resolution proposes. As you have heard from Sam Gusman, our Toxics program has worked with the Conservation Foundation under a grant that would bring industry, environmental and other interest groups together to address a variety of policy and regulatory issues. Ninety-five percent of the funds for this program came from EPA and the remaining five percent matching funds came from the Conservation Foundation. For example, the Conservation Foundation organized a large group with representatives from different backgrounds and perspectives, to consider approaches to evaluating new chemical substances and significant new uses of existing substances under the Toxic Substances Control Act. What we learned from this experience helped frame the pre-manufacture regulations we

proposed in January of 1979, as well as our significant new use rules, and testing guidelines. It also helped in part shape our efforts to mitigate the burden on small companies. In addition, the Conservation Foundation organized conferences which address the need for warning regulations, how to balance the risks and benefits of chemical substances, and the merits of addressing categories of substances in rulemaking.

Although this program was sucessful overall, it was most successful from our standpoint in those areas where there were several opportunities for EPA to participate actively in discussions with outside groups. I note that you have addressed this issue in paragraph 9 of your proposal, by providing that while agency representatives may not negotiate for their agency nor vote on matters before the commission, they shall provide information, make suggestions, and report to their agencies. I believe your proposal takes an important step in the right direction by allowing agency personnel to participate actively in the discussions in ways that can aid the negotiations without binding their agency to any particular course of action.

The National Coal Policy Project, asbestos, and toxics examples point out the major advantage of regulatory negotiation--it can provide a forum for interested parties

to discuss substance. In the National Coal Policy Project, an ad hoc forum was created. Regulatory negotiation occurred in the asbestos example as those interested consulted one another concerning a problem and its possible solutions. The toxics example represented the involvement of EPA in regulatory negotiation which most closely resembles your proposal. These experiences lead us to believe that regulatory negotiation can add to the quality of the outcome. We plan to explore the regulatory negotiation concept further by funding a study by the Office of Environmental Mediation in Seattle, Washington, to determine how mediation techniques can be applied to individual cases of hazardous waste disposal siting. Hazardous waste disposal siting is a critical problem which desparately needs a means to resolve conflicts between various interests.

Currently, interested parties can give us their views as we develop regulations after learning from our regulatory agendas, our Advanced Notices of Proposed Rulemaking, or our specific outreach efforts that we are writing regulations in a particular area. Then they can review our proposed regulations in the Federal Register and file comments. We respond to those comments in the Federal Register when

issuing final regulations. Then many of our regulations are challenged in court, by industry, by environmental groups, or both. Court review is narrow, based often on the legal validity of the regulation rather than on the underlying policy choices.

We see regulatory negotiation as a way of augmenting the notice and comment process consistent with the requirements of the Administrative Procedures Act, by which the affected parties are brought in for substantive discussions not just with us, but with each other at the stage when they can be most helpful. It will not completely eliminate litigation, although it might eliminate some cases. It may mean that the issues in those cases we do litigate are more clearly defined and closer to the real controversy than is presently the case. For example, if we could agree on the validity of certain testing procedures, that would be a significant step. If we were not able to agree on the level of the standard based on the results of applying those procedures, we would at least have limited the litigation to the critical issue.

We support your proposed resolution's objectives and we in the Administration believe that a pilot project may be useful in examining its potential. A pilot project should

tell us what the role of the government ought to be in organizing or funding negotiation commissions. Perhaps after some pilot projects, we may find that interested business, labor, and public interest groups and others may join together on their own to do regulatory negotiation. We feel that in addition to labor, business, and public interest groups (which we believe includes environmental groups), representatives from state and local government, agricultural groups, rural and urban groups, minority groups, consumer groups, academic groups, and Indian tribes should be among the interested parties that would be invited to participate in a negotiation commission. The commissions should actively solicit the comments or suggestions of parties, who may be interested in the issues, yet not selected as representatives. This additional participation could be modeled upon the long established tradition of "amicus curiae" involvement.

There are several other issues raised by the resolution. First, whether and how agencies should select mediators. Any mediator must be selected in such a way that their credibility and integrity are not suspect, which may mean that they should be selected and paid by an outside group, like the American Arbitration Association or the Federal Mediation and Conciliation Service.

Second, we have found that a fact-finding staff is essential to a good mediation/negotiation effort. In arguing over substantive issues, the question constantly arises: "What information would change your mind?"

Third, how do we deal with the problem of ex parte communications, as prohibited by the Administrative Procedure Act and the Home Box Office case?

Fourth, we feel some consideration must be given to the anti-trust implications of applying regulatory negotiation to the rulemaking process and encouraging representatives of industry to meet together and work toward agreement.

Finally, and most importantly, what will be the scope of the regulatory negotiation? As broad as general policy in an area of regulation, or as narrow as individual standards or testing procedures? I believe that we should learn from more experience what scope is most useful. Therefore, regulatory negotiation ought to be tried for a range of applications, neither constraining the scope of application nor requiring that it be applied a large number of times. Basically I am recommending an exploratory period in which we learn by carefully selected pilot tests how this approach can be most useful.

In summary, I think that regulatory negotiation can be a useful test for narrowing and focusing conflicts on regulatory issues. The degree to which the government is involved is an issue that has to be carefully considered. I think we should be careful not to oversell it--it won't solve the basic regulatory issues EPA and others face. But if it can clear up some issues, reduce the level of the shouting, and yield better mutual understanding among government, business, and public interest groups without costing too much in dollars and delays, then it can be quite valuable. At least it's worth a try to find out from experience.

I would also like to take this opportunity before both Committees to outline briefly a few examples of efforts we have underway at EPA to take into account the opinion and problems of people affected by our regulations.

We employ a very open and orderly regulation development process in which:

- We perform a series of analyses, including an economic impact statement, in which costs to industry (including small business) of pollution control and impact on prices, capacity, and financial conditions are examined.

- We allow affected parties open access to the process, through public hearings, public participation, and public notice.

To help businesses impacted by our regulations, we:

- We give seminars to industry on pollution control and related processes and equipment.
- We provide information on assistance available through Federal financial aid programs and tax provisions.

EPA has a number of programs designed particularly to aid small business, including the following:

- Under joint agreement with SBA, EPA provides SBA with advance information on the economic impact on small business of proposed EPA regulations; and SBA, in turn, informs EPA of proposed legislation designed to help small business meet environmental requirements.
- Since 1971, EPA, and the Department of Labor have operated the "Economic Dislocation Early Warning System", which is designed to assist firms, workers, and communities threatened by plant closings.
- EPA has an SBA liaison to insure full utilization of EPA programs to provide financial aid to meet environmental requirements. Additionally, each EPA regional office has an SBA coordinator to aid small businesses in securing financial and technical assistance for permitting and pollution control equipment.

EPA cooperates with other Federal agencies in a number of ways relating to its regulations.

- In 1977, the Interagency Regulatory Liaison Group (IRLG) was formed. Made up of CPSC, FDA, OSHA, and the Food Safety and Quality Service of the Department of Agriculture, the IRLG is concerned with the regulation of toxic and hazardous

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substances and works on compliance and enforcement procedures, development of standard test protocols, quality assurance procedures, and approaches to the assessment of risk. Through these joint efforts, we are reducing the paperwork burden and expense to industry of regulatory compliance with multi-agency requirements.

- EPA participates actively in the Regulatory Council. The Council seeks to identify and address overlapping rules and problems of multiple regulatory impacts on a single sector of the economy. It publishes regulatory calendars and assembles interagency groups which deal with regulatory problems.

- The President established an Interagency Taskforce on Improving Assistance Programs, to Mitigate Economic Impact of Environmental Programs, chaired by CEQ. It recommended that EPA establish an office to coordinate activities aimed at averting economic dislocations from its programs. EPA's Office of Planning and Management has established this Economic Assistance Office and each of our regional offices has an economic assistance coordinator. The headquarters office provides coordination, analysis and evaluation, while the regions distribute information and work with individual firms.

In summary, EPA is strongly committed to making regulation meet its social and human objectives under our statutes, with a minimum of cost, waste, and paperwork. I believe that we have already made significant strides in improving the regulatory process and making it more responsive to the needs of those it serves and to the special problems of those it regulates. We welcome

concepts such as "regulatory negotiation" which will to help us expand our efforts to make the regulatory process work better.

This concludes my prepared statement. I will be happy to respond to any questions you may have.

Mr. GAMSE. Yes, I plan to just skip over significant parts of it.

Senator LEVIN. Don't skip the significant parts. [Laughter.]

Mr. GAMSE. OK, I'll skip over insignificant parts of it. I'll skip over my parts of it.

We have had some limited experience with regulatory negotiation, though the form differs from what you proposed in your resolution. Our experience may help further understanding of how regulatory negotiation might work and what its potential benefits might be.

I know you heard a lot of testimony yesterday about specific examples so I won't go into a lot of detail on various projects that we have had that are similar.

Just very briefly, we were involved in the national coal policy project that you heard about yesterday. It involved more than 60 participants from the various mining, coal using, and environmental groups. We think the major achievement of the project was the environmentalists' acceptance of streamlined utility licensing and siting procedures. This meant an enormous decrease in the potential for delay caused by technical and procedural challenges to construction by utilities. On the other hand, the industry representatives promised to notify the public before applying for powerplant licenses, and to support public financing of qualified public interest groups' participation in hearings. The parties involved found that they could focus on resolving some substantive issues instead of using procedural battles in court to delay projects. We think that is a significant advance. We served as a coordinator and partial sponsor of the national coal policy project, and we are proud of the step forward that it represents.

One drawback that we saw in that project was its failure to include all of the significant parties. For example, there were no consumer or Indian representatives on the group and yet, they play a major part in dealing with these kinds of issues. This suggests to me that a mediator should be appointed at the outset of negotiations and the mediator should be given at least 30 days to determine whether all of the significant parties are willing to participate and whether they can agree on how to proceed.

Another experience that I think is even closer to the kind of process your resolution suggests is the toxics project that Sam Gusman, of the Conservation Foundation, described. Under a grant the EPA provided that would bring industry, environmental and other interest groups together to address a variety of policy and regulatory issues regarding our toxics program. We gave 95 percent of the funds with the remaining 5 percent from the Conservation Foundation. The foundation organized a large group with representatives from different backgrounds and perspectives, to consider approaches to evaluating new chemical substances and significant new uses of existing substances under the Toxic Substances Control Act. What we learned from the experience helped frame the premanufacturing regulations that we proposed in January of 1979, as well as our significant new use rules, and testing guidelines. It also helped in part to shape our efforts to mitigate the burden on small companies. In addition, the Conservation Foundation organized conferences which address the need for hazardous warning regulations, how to balance the risks and benefits of chemical substances,

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and the merits of addressing categories of substances in rulemaking. We think we learned a lot from that process. I might add that I think it probably contributed to having less litigation or less broad litigation as a result of some of our actions.

Although it was successful overall, it was most successful from our standpoint in those areas where there were several opportunities for EPA to participate actively in discussions with outside groups. I note that you have addressed this issue in paragraph 9 of your proposal, by providing that while agency representatives may not negotiate for their agency nor vote on matters before the commission, they shall provide information, make suggestions, and report to the agencies. I believe that your proposal takes an important step in the right direction by allowing agency personnel to participate actively in the discussions in ways that can aid the negotiations without binding their agency to any particular course of action.

We plan to explore the regulatory negotiation concept further by finding a study by the Office of Environmental Mediation in Seattle, Wash., to determine how mediation techniques can be applied to individual cases of hazardous waste disposal siting. That type of siting problem, I believe, is a critical problem which desperately needs a means to resolve conflicts between various interests. I am hopeful that this kind of approach can help deal with that kind of a problem.

Under our current approaches, we try to solicit views from all interested parties as we develop regulations, including from the regulatory agendas that we put out and that the Regulatory Council puts out, our advanced notices of proposed rulemaking, our public comment periods, and our specific outreach efforts to get interested parties. Much of this comes about as a result of our public comment period and review of our documents plus the specialized efforts that we make to go after interested parties. Many of our regulations are challenged in court by industry, by environmental groups, and probably most frequently, by both. Court review is often narrow, based on the legal validity of the regulation rather than on the underlying policy choices.

We see regulatory negotiation as a way of augmenting the notice and comment process consistent with the requirements of the Administrative Procedures Act, by which the affected parties are brought in for substantive discussions not just with us, but with each other at the stage when they can be most helpful. It will not completely eliminate litigation, although it might eliminate some cases. It may mean that the issues in those cases we do litigate are more clearly defined and closer to the real controversy than is presently the case.

We support your proposed resolution's objectives and we in the administration believe that a pilot project may be useful in examining its potential. A pilot project should tell us what the role of the Government ought to be in organizing or funding negotiation commissions. Perhaps, after some pilot projects, we may find that interested business, labor, and public interest groups, and others may join together on their own to do regulatory negotiation. We feel that in addition to labor, business, and public interest groups, which, incidentally, we interpret to include environmental groups,

representatives from State and local government, agricultural groups, rural and urban groups, minority groups, consumer groups, academic groups, and Indian tribes should be among the interested parties that might be invited to participate in a negotiation commission. The commission should actively solicit the comments or suggestions of parties, who may be interested in the issues, yet not selected as representatives. This additional participation could be modeled upon the long established tradition of amicus curiea involvement.

There are several other issues raised by the resolution that I would like to bring to your attention. First, whether and how agencies should select mediators. Any mediator must be selected in a way that does not lead to any suspicions about their credibility and integrity. That probably means that they should be selected and paid by an outside group, such as the American Arbitration Association or the Federal Mediation and Conciliation Service.

Second, we have found that a factfinding staff is essential to a good mediation/negotiation effort. In arguing over substantive issues, the question constantly arises: "What information would change your mind?" We need to have the ability to go out and get factual information to support these negotiations.

Third, how do we deal with the problem of ex parte communications, as prohibited by the Administrative Procedures Act and the Home Box Office case?

Fourth, we feel some consideration must be given to the antitrust implications of applying regulatory negotiation to the rulemaking process and encouraging representatives of industry to meet together and work toward agreement.

Finally, and most importantly, what will be the scope of the regulatory negotiation? As broad as considering general policy in an area of regulation, or as narrow as individual standards or testing procedures? I think we should learn from more experience what scope is most useful before we reach resolution on that.

Therefore, regulatory negotiations ought to be tried for a range of applications, neither constraining the scope of application nor requiring that it be applied a large number of times. Basically I am recommending an exploratory period in which we learn by carefully selected pilot tests how this approach can be most useful.

In summary, I think that regulatory negotiation can be a useful test for narrowing and focusing conflicts on regulatory issues. The degree to which the Government is involved is an issue that has to be carefully considered. I think we should be careful not to oversell it—it won't solve the basic regulatory issues EPA and others face. But, if it can clear up some issues, reduce the level of the shouting, and yield better mutual understanding among Government, business, and public interest groups without costing too much in dollars and delays, then it can be quite valuable. At least it's worth a try to find out from experience.

I would like to provide some additional materials for the record besides the full, written testimony I have covered. The material that I want to bring to the two committees attention on actions that we have taken to enhance our communication with and from the public and also to limit the impact that we have had on small

businesses and in business in general. If I could add that to the record then I will skip over that portion of my written testimony.[1]

Senator LEVIN. It will be put into the record.

Mr. GAMSE. Thank you.

Senator LEVIN. Thank you very much, Mr. Gamse.

Ms. Beardsley, I presume?

STATEMENT OF KATE C. BEARDSLEY, DEPUTY DIRECTOR, U.S. REGULATORY COUNCIL

Ms. BEARDSLEY. Mr. Chairman, I am Kate Beardsley, the Deputy Director of the U.S. Regulatory Council. With me is Chuck Ludlam, the counsel to the regulatory reform task force. I appreciate the opportunity to be here today to talk about regulatory negotiation commissions.

As I understand it, the goal of the pending proposal on regulatory negotiation commissions is to encourage voluntary cooperation, particularly among private groups which hold differing, even conflicting views, on the appropriate role of Government regulation. I believe that encouraging communication among private parties with diverse interests would be highly beneficial. At the very minimum, such communication would increase the awareness of all the parties and get the parties involved in the difficult process of balancing differing and conflicting views.

The Regulatory Council already plays a role in the regulatory process which is somewhat analogous to the role to be performed by the commissions. Whereas the principal focus of the commissions would be to bring private parties together, the Council brings Federal agencies together to coordinate regulatory activities that cut across agency lines. In this process, the Council has gained valuable practical experience in grappling with the problems which the proposed resolution addresses.

We have found, in attempting to resolve disputes among Federal agencies, that such agencies are more than willing to cooperate and to work with us to reach a solution we all can live with. Most agencies are extremely concerned about the impact of their regulations on the private sector.

We have often found solutions. For example, our coal project has established mechanisms to identify and resolve day-to-day problems, resulting from conflicting or overlapping regulatory policies that affect the coal industry. The Council works with key Federal regulatory officials and top-level State officials of coal-producing and coal-consuming States to find solutions to the problems brought to the Council's attention.

The Council also has facilitated communication among diverse interests by bringing together industry groups and Federal agencies to help them develop acceptable environmental and health and safety regulatory policies.

For example, responding to a request from the wood preservative industry and the House Agriculture Committee, who were concerned about the possibility of duplicative standardsetting by the EPA and the Occupational Safety and Health Administration, the Council worked out an agreement clarifying the jurisdictions of EPA, OSHA, and the National Institute of Occupational Safety and

[1] Information not available at time of going to press.

Health in the regulation of wood preservatives. This agreement, which both the industry and agencies found satisfactory, addressed concerns related to the timing and criteria for regulatory decisions, lead agency responsibility, and enforcement.

The Council is also playing a role in resolving what one trade association views as a conflict between OSHA's noise control standards and the Food and Drug Administration's good manufacturing practice requirements. The trade association felt that they could not comply with OSHA's noise standards without sacrificing the quality of their products under FDA's requirements. The Council has brought together the trade association, OSHA, and FDA. They agreed to look at the problem and we believe they will be able to work out a solution.

Increasing communications between private groups—as the pending proposal seeks to do—could work as well. Any process that will expand the areas of agreement among interested groups and reduce the rhetoric about Government regulation, as you would expect, will be most welcome to those of us in Government. Such agreements can improve communications between the public and private sector and even within the Government itself. Regulation can and should be a cooperative process, with Federal regulatory agencies, industry, and private interest groups working together to improve the regulatory process. Establishment of regulatory negotiation commissions on certain highly complex issues could provide an affirmative role for both industry and citizen groups in the regulatory arena. While I have some reservations about the extent to which the Government should be directly involved in organizing and funding such commissions at first, the Government should take positive steps to encourage private parties to meet among themselves, to organize to discuss matters of mutual interest.

Improving the lines of communication among private groups can eliminate many of the adversary aspects that exist in the present methods of establishing regulatory policy. It alters the role of interested parties from reactive to proactive. Instead of waiting for an agency to publish a notice of proposed rulemaking, for example, industry and citizen groups may be able to anticipate policy development, build consensus in the initial stages, and provide the agency with constructive and reasonable suggestions when it addresses the issue.

Where such a consensus can be reached among interested persons, they may be less inclined to engage in hollow and partisan posturing when the matter comes before the agency in a regulatory proceeding.

Negotiations among groups on various environmental issues have proven to be successful in certain cases in the past. For example, environmental mediators helped the parties achieve an important settlement between the New England Electric Power Co., citizens of Brayton Point, Mass., the Environmental Protection Agency, and the Department of Energy. Citizens of Swanville, Maine, and the owners of a soon-to-be-opened hydroelectric plant also had their environmental dispute mediated to a successful and mutually satisfying solution. And, of course, the national coal policy project, who you have already heard from, is recognized as a highly successful effort.

The key to the success of any such commission must be the voluntary investment of time and energy by private persons, the willingness to listen and cooperate, and the flexibility to compromise. Generally speaking, I believe private parties will tend to participate, cooperate, and compromise more effectively when a commission is their own creation and responsibility than if the Government is heavily involved. I do have some doubts as to whether such commissions would be useful while rulemaking is pending. When an agency initiates a rulemaking proceeding, it must preserve its neutrality in the matter, give all parties an open and equal opportunity to participate, and, of course, must assume the ultimate responsibility for meeting its statutory responsibilities.

I have also raised some practical questions about the pending proposal in my written testimony that should be considered carefully before we ask agencies to formalize the process your resolution addresses.

I hope, however, that we can move forward to test this idea. It may well be useful to direct one Federal agency to experiment with the commission concept. This agency could be directed to encourage establishment of a commission by means short of outright funding. For example, the agency could invite a broad cross-section of parties interested in a certain area of Government regulation to a meeting, provide detailed background information on the negotiation commission concept, and express the willingness of the agency to cooperate actively with any commission that is established. At the initial stages of organization the agency could provide clerical services, mailing lists, meeting rooms, and other assistance. The agency could encourage foundations and others to join in funding a commission. However, to avoid any criticism of its involvement, the agency should have no direct role in determining the membership of the commission, setting its agenda, managing its operations, or providing funding.

I have serious doubts whether the agency should participate as a mediator or even appoint a mediator at the request of a commission. On the basis of such a pilot project, both the Congress and the administration can determine whether more direct involvement by the Government is necessary to encourage future establishment of commissions.

I appreciate the fact that you are approaching this commission concept in the same spirit in which such a commission must approach the issues it addresses, with a spirit of cooperation. I am willing to meet with you and your staff at any time to further discuss this issue. I would be happy to try to answer any questions you may have about my testimony.

Senator LEVIN. Thank you very much, Ms. Beardsley. You asked a lot of good questions.

Ms. BEARDSLEY. Thank you.

Senator LEVIN. I am interested in your answers to some of them.

[The prepared statement of Ms. Beardsley follows:]

U.S. REGULATORY COUNCIL
Washington, D.C. 20580

FOR RELEASE ON DELIVERY
Expected at 9:30 a.m.
Wednesday, July 30, 1980

STATEMENT OF KATE C. BEARDSLEY
DEPUTY DIRECTOR, U.S. REGULATORY COUNCIL
BEFORE THE SELECT COMMITTEE ON SMALL BUSINESS AND THE SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS, UNITED STATES SENATE

Mr. Chairman and Members of the Committee:

As Deputy Director of the U.S. Regulatory Council, I am pleased to be here today to address the subject of regulatory negotiation commissions.

Quite often, if the words "Federal Regulation" are mentioned, emotions rise in the room. Either the government is overregulating and destroying American ingenuity and productivity or, the government is failing in its duty to protect its citizens from hazards such as Love Canal and unsafe airplanes.

Such emotional reflex reactions reflect the complexity and importance of the problems government regulators must grapple with and the adversial relationships such problems can create. Complex new technologies -- involving scientific formulas that few understand -- create hazards and opportunities that were undreamed of only a generation ago. For example, the number of all chemicals has more than doubled in the last ten years,

reaching an incredible total of 5 million. Improper use of these newly discovered chemicals, through plain ignorance or insufficient care, may severely damage our health and even our future. To meet these difficult and complex challenges, to protect the quality of American life, and to ensure economic health, the Congress has directed Federal agencies to issue regulations implementing statutory requirements.

Regulations, no matter how carefully drafted, mean new demands and new costs to certain segments of the American public. Fundamental goals, such as a clean and healthy environment and a safe workplace, however, will not be achieved without some government regulation nor can these goals be achieved without the active cooperation of industry, citizen groups, and other interested individuals.

As I understand it, the goal of the pending proposal on regulatory negotiation commissions is to encourage this voluntary cooperation, particularly among private groups which hold differing, even conflicting views, on the appropriate role of government regulation in certain areas of our economy. I believe that encouraging communication among private parties with diverse interests would be highly beneficial. At a very minimum, such communication would increase the awareness of all the parties and get the parties involved in the difficult process of balancing differing and conflicting views.

The U.S. Regulatory Council already plays a role in the regulatory process which is analogous to the role to be performed by such negotiation commissions. Whereas the principal focus of the commissions would be to bring private parties together, the Council brings Federal agencies together to coordinate regulatory activities that cut across agency lines; the Council also identifies areas of overlap, duplication and conflict in regulations, and provides information about the cumulative effect of regulation on the economy and on particular sectors. In this process, the Council has gained valuable practical experience in grappling with the problems which the proposed resolution addresses -- namely "contradictory, inefficient, unjustifiably expensive, and frequently counterproductive reqirements."

We have found in attempting to resolve disputes between and among Federal agencies that such agencies are more than willing to cooperate -- and to work with us to reach a solution we all can live with. I can assure you that most agencies are intensly concerned about the impact of their regulations on the private sector.

The solutions the Council helps the agencies to reach are successful. For example, our Coal Project has established mechanisms to identify and resolve day-to-day problems, resulting from conflicting or overlapping regulatory policies

that affect the coal industry. The Council works with key Federal regulatory officials and top-level state officials of coal-producing and coal-consuming states to find solutions to the problems brought to the Council's attention.

The Council also has facilitated communication among diverse interests by bringing together industry groups and Federal agencies to help them develop acceptable environmental and health and safety regulatory policies. Increasing communication between the public and private sectors is just as important as increasing coordination among the agencies themselves.

For example, responding to a request from the wood preservative industry and the House Agriculture Committee who were concerned about the possibility of duplicative standard-setting by the Environmental Protection Agency and the Occupational Safety and Health Administration, the Council worked out an agreement clarifying the jurisdictions of EPA, OSHA, and the National Institute of Occupational Safety and Health in the regulation of wood preservatives. This agreement -- which both the industry and agencies found satisfactory -- addressed concerns related to the timing and criteria for regulatory decisions, lead agency responsibility, and enforcement.

The Council is also playing an important role in resolving what one trade association views as a conflict between OSHA's noise control standards and the Food and Drug Administration's Good Manufacturing Practice requirements. The trade association felt that they could not comply with OSHA's noise standards without sacrificing the quality of their products under FDA's requirements. The Council brought together the trade association, OSHA, and FDA, and they agreed to look at the problem in the field, consider the proposed solutions, and discuss their opinions on the next steps to obtain a satisfactory, practical resolution.

In these examples, we gave participants, both agencies and private parties, the opportunity to communicate with each other -- to sit and talk around a conference table, rather than have them settle their disputes through depositions and legal proceedings.

Increasing communications between private groups -- as the pending proposal seeks to do -- is another worthwhile objective. Any process that will expand the areas of agreement among interested groups and reduce the harsh rhetoric about government regulation will -- as you would expect -- be most welcome by those of us in government. Such agreements will improve communications between the public and private sector and even

within the government itself. Regulation can and should be a cooperative process, with Federal regulatory agencies, industry, and private interest groups working together to improve the regulatory process. Establishment of "regulatory negotiation commissions" on certain highly complex and controversial issues could provide an affirmative role for both industry and citizen groups in the regulatory arena. While I have some reservations about the extent to which the government should be directly involved in organizing and funding such commissions, we can agree that the government should take positive steps to encourage private parties to meet among themselves, to organize to discuss matters of mutual interest.

Improving the lines of communication among private groups can eliminate many of the adversary aspects that exist in the present methods of establishing regulatory policy. It alters the role of interested parties from "reactive" to "proactive." Instead of waiting for an agency to publish a notice of proposed rulemaking, for example, industry and citizen groups may be able to anticipate policy development, build consensus in the initial stages, and provide the agency with constructive and reasonable suggestions when it addresses the issue.

Where such a consensus has been reached among interested persons, they may be less inclined to engage in hollow and partisan posturing when the matter comes before the agency

in a regulatory proceeding. I can assure you that the agency itself can be expected to be much impressed with -- and give very careful consideration to -- any suggestions which are proposed and agreed to by a broad consensus of the interested parties. Together, the agency and such parties can help fashion a regulatory policy which can minimize the costs of regulation and maximize the benefits of greater health and safety.

Negotiations among groups on various environmental issues has proven to be successful in certain cases in the past. For example, environmental mediators helped the parties achieve an important settlement between the New England Electric Power Company, citizens of Brayton Point, Massachusetts, the Department of Energy, and the Environmental Protection Agency. Citizens of Swanville, Maine, and the owners of a soon-to-be-opened hydroelectric plant also had their environmental dispute mediated to a successful and mutually satisfying solution. And, of course, the National Coal Policy Project, funded by more than 60 companies and foundations, is recognized as a highly successful effort.

The key to the success of any such commission must be the voluntary investment of time and energy by private persons, the willingness to listen and cooperate and the flexibility to compromise. Generally speaking, I believe private parties

will tend to participate, cooperate and compromise more effectively when a commission is their own creation and responsibility than if the government is heavily involved. I do have some doubts as to whether such commissions would be useful while rulemaking is pending. When an agency initiates a rulemaking proceeding, it must preserve its neutrality in the matter, give all parties an open and equal opportunity to participate and, of course, must assume the ultimate responsibility for meeting its statutory responsibilities.

I do want to raise some practical questions about the pending proposal. A thorough evaluation of any proposal for government involvement in establishing and funding negotiation commissions must, I believe, address these issues. At what point in the development of regulatory policy should commissions be established and how will they be structured so as not to cause additional delay? How would the government ensure that a commission consisted of a broad and balanced representation of interested parties? How would the government be able to determine in advance whether the parties represented on a commission are likely to be able to reach a consensus? Does an agency have a conflict of interest in helping to form a consensus which inevitably will have a direct impact on its activities? Should a third-party agency handle applications

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and dispense funds? Is there an existing Federal agency which could perform this function? Does every Federal agency need to establish commissions or is there a reason to limit commissions to health, safety, and environmental agencies? Are there certain types of issues for which commissions are most effective? How could an agency determine how much money a commission should receive? How does an agency allocate its limited resources among a number of proposed commissions? What does the agency do if competing commissions are proposed on the same subject? What is the relationship between negotiation commissions and advisory committees? Must the negotiation commissions meetings be open to the public? If the negotiation commissions hold closed sessions, will they violate the Sunshine Act or are the commissions to be exempt from all such requirements? Can an agency, or a commission be sued for failing to comply with the requirements of the legislation? Should the agency provide all of the funding or only to the extent to which private funds are unavailable? What is the appropriate degree of agency participation in the deliberations of a negotiation commission? Do the deliberations and work product of the commission become part of a related agency rulemaking record? How much weight, if any, must the agency give to the recommendations of a commission? Would agency participation in a commission proceeding constitute an ex-parte contact or

violate other procedural requirements? Are there some agencies which do not have authority to expend funds for a commission absent express statutory authority?

We need to consider carefully these questions before we ask agencies to formalize the communication process through the commissions your resolution describes. I do want, however, to provide some constructive suggestions as well as to pose questions. It may well be useful to direct one Federal agency to experiment with the commission concept. This agency could be directed to encourage establishment of a commission by means short of outright funding. For example, the agency could invite a broad cross-section of parties interested in a certain area of government regulation to a meeting, provide detailed background information on the negotiation commission concept, and express the willingness of the the agency to cooperate actively with any commission that is established. At the initial stages of organization of any commission, the agency could provide clerical services, mailing lists, meeting rooms, and other assistance. The agency could encourage foundations and others to join in funding a commission. However, to avoid any criticism of its involvement -- which would be certain to arise with the issues that need to be negotiated by a commission -- the agency should have no direct role in determining the membership of the

commission, setting its agenda, managing its operations, or providing funding. I have serious doubts whether the agency should participate as a mediator or even appoint a mediator at the request of a commission. On the basis of a such a pilot project, both the Congress and the Administration can determine whether more direct involvement by the government is necessary to encourage establishment of commissions.

I appreciate the fact that you are approaching the commission concept in the same spirit in which such a commission must approach the issues it addresses, with a spirit of cooperation. I am willing to meet with you and your staff at any time to further discuss this issue. I commend you for your innovative thinking on this interesting and worthwhile subject. I would be happy to try to answer any questions you may have about my testimony.

Senator LEVIN. Who should make the appointment of the commission and the mediator? Do you have any thoughts on that?

Ms. BEARDSLEY. Roy's idea about the Mediation and Conciliation Service makes sense. I think that the parties in the commission probably ought to be able to make that appointment themselves. If they cannot agree on appointing a mediator then, it is unlikely that they will be able to agree on other issues.

Senator LEVIN. Who appoints the party?

Ms. BEARDSLEY. In the pilot project that I am proposing, the Government should put out a general call and probably one party will have to determine the others and invite others to participate. I am not sure that you will end up with a balanced group but I think it would be very, very difficult for the Government to appoint the parties and ensure a balanced group.

Senator LEVIN. You say that one party should take the initiative and appoint the other parties? What happens if two parties take the initiative?

Ms. BEARDSLEY. Fine, I am just saying——

Senator LEVIN. No, and appoint different parties?

Ms. BEARDSLEY. Then that is a question of restraint and I am not sure how you would go about it.

Senator LEVIN. You do not think that there is an agency in the Government that can select the parties to participate? I do not mean the same agency that is going to be considering the recommendations.

Ms. BEARDSLEY. I think it is possible.

Senator LEVIN. What would be some of the agencies that might fulfill that role?

Ms. BEARDSLEY. I am not sure. I would have to think about it and supply an answer to you later.

Senator LEVIN. As I understand your testimony, you think the agency involved should not participate?

Ms. BEARDSLEY. Yes, I don't mean to say they should not be there and should not observe and should not help. I just mean that they——

Senator LEVIN. Should not actively participate in the hearing or negotiations?

Ms. BEARDSLEY. That's right.

Mr. GAMSE. If I may comment on that. I think the agencies involved should not be there in a barganing role because they shouldn't be in a position to commit the agency head to a particular resolution. But, if the people from the agency are involved in the regulation development process and know what the issues are, I think they can help the commissions focus on the issues that are most important and most difficult for the regulatory agency. Maybe you could call them participants in the negotiation sense but they would be guides or facilitators for the process. I think that a little bit of agency involvement in that way may save a lot of problems later on by helping the commission narrow the issues and deal with some of the thorny technical issues that might stand in the way of getting mutually agreeable regulations through the normal process.

Ms. BEARDSLEY. If I could add one other thing?

Senator LEVIN. Sure.

Ms. BEARDSLEY. The question, I think, raises the issue of time. The closer you get to a pending rulemaking proceeding, the more difficult it is for an agency to participate. The farther back you start in the pre-ANPRM (Advance Notice of Proposed Rule Making) stage the participation of the agency does the greatest good.

Senator LEVIN. Do you think there is danger that the agency might delay its own proposed rule in a way by the results of the negotiation?

Ms. BEARDSLEY. I think it's possible but I think that could be gotten around, again, by staging the process in such a way that the commission is active in either the pre-ANPRM or post-ANPRM stages.

Senator LEVIN. Say that the commission starts off with the expectation that its work will be completed before a proposed rule is published and negotiations drag on and the agency comes along and sees that progress is being made and would like to see the results and delays its own proposal?

Ms. BEARDSLEY. I think that is a possible drawback.

Senator LEVIN. You would consider that to be a drawback. Mr. Gamse, would you consider that to be a drawback?

Mr. GAMSE. I can imagine circumstances that go both ways. EPA is often in a position of being late in promulgating regulations. And I can see some——

Senator LEVIN. You've noticed that? [Laughter.]

Mr. GAMSE. I can see some advantages of getting better agreement from a negotiation that would then reduce the subsequent litigation and, perhaps, make the regulation effective in a shorter period of time. I think we have to be careful not to set up a process that is very likely to drag things out. Therefore, even though the time limit is not covered in the draft resolution, it might be a good idea to specify some time limits which at the very outside should be to close the public comment period on the proposed regulation so that the whole record of negotiation would be part of the public record that the agency considers when they are filing the regulation.

Senator LEVIN. There are two attorneys here; right? Both of you have counsel?

Mr. GAMSE. Yes, sir.

Senator LEVIN. Are there any legal problems with agencies considering ex parte communications prior to the opening of the public comment period? Is there any legal problem that either of you know of in an agency delaying publication of a proposed rule in order to receive such communications?

Mr. LUDLAM. The law on ex parte communications in Federal lawmaking is extremely unsettled. None of the court cases at the moment have applied any restrictions to pre-notice of communications.

Senator LEVIN. What about your agency? If your agency had a commission out here and you are about 90 percent through your own preparation, but it looks like about a month before you could get the benefits of their recommendations, would you tell them not to wait or that they could wait?

Mr. LUDLAM. Unless there is a statutory time limit on the promulgation of regulations. If the timing of the regulation is at their discretion, I don't think there would be any problem in waiting. But, there are many cases in which they are on a statutory time limit or judicial time limit.

Senator LEVIN. Ms. Minero?

Ms. MINERO. We are almost always under a statutory or court order deadline in our regulations. Nevertheless, I would advise the agency to wait under the circumstances that you described. Generally, when we are late, we get sued. In the circumstances where you are dealing with regulatory negotiation I think it is very likely that the party that would normally sue us would be an active participant in that negotiation. So, I think I would advise the agency to wait.

Senator LEVIN. Who would decide the question of meeting a deadline, somebody over at the agency?

Ms. MINERO. Right.

Senator LEVIN. Who do you assign that to, just in terms of the ex parte aspects of the communication?

Ms. MINERO. I am very sensitive to that. I would advise that all commissioners with EPA that are in attendance be put in a record. It does not have to be a verbatim transcription but some sort of summary that would be a part of the public record. I can appreciate that may be necessary for negotiation reasons to have some conversations off the record, but I would not allow EPA people to be present at that time.

Senator LEVIN. I was not talking so much about participation. I was talking about delaying a process in order to receive the ex parte communication.

Ms. MINERO. But, under the scenario I have just been describing, it really would not be an ex parte communication because it would have been a part of the record.

Mr. LUDLAM. An ex parte communication would mean that——

Senator LEVIN. A private party communication, let me rephrase it. Do you see any problem with a governmental agency delaying a process it otherwise would follow according to a certain time period, in order to receive a communication from a private party?

Ms. MINERO. Well, as you have pointed out, we miss most of our deadlines anyway and that seems to be a better reason than the ones we usually have.

Mr. LUDLAM. But, the communication they would be receiving would not necessarily be an ex parte communication.

Senator LEVIN. I want to rephrase it. Just forget the ex parte. Just the fact that they are delaying a process in order to await the conclusion of a private discussion.

Mr. LUDLAM. They could await a study that they had funded themselves by an expert. They could wait for congressional activity in the area. There are any number of reasons for them to wait and I would think that they would have ample discretion to wait until they were ready.

Senator LEVIN. Mr. Gamse, do you have any comment about the first couple of questions that I asked Ms. Beardsley about appointment of the group, appointment of the mediator? Do you have any different views on that?

Mr. GAMSE. Not different, I see two different ways it could happen. One is if you start from the mediator and the mediator rounds up the parties to participate. An alternative approach, which would likely happen if this idea is successful and people start doing it voluntarily, would be for representatives of different viewpoints to get together, agree to do regulatory negotiation, and they, themselves appoint the mediator. I could see either of those working effectively.

If your resolution is aimed at making this more of a government-sponsored process, then I think we are better off with a mediator being appointed. But, I would hope if this approach is successful, that it will lead to more instances like the coal project where the adversaries got together and found their own person to stand in the middle and help facilitate the process.

Senator LEVIN. You said something in your testimony about trying to find ways to be certain that the recommendations have some impact. Let me just phrase the question more neutrally. Do you think a recommendation coming from a commission should it be given more weight than it otherwize should have?

Mr. GAMSE. I think that, practically speaking, a regulatory agency, if it is confronted with a concensus viewed from interests that are normally adversarial, we have to put a lot of weight on that. I don't think the head of an agency could put any extra weight on a comment because it came from a particular individual or a particular commission. That goes beyond weighing the merits. But, certainly, if the people who normally sue you from both sides on regulatory issue are in agreement on some of the aspects of it then, I think, the regulatory agency would first ask if there is anybody who has been left out of this negotiation that we should pay attention to. If that was not the case, I think you would see most regulatory agencies paying very close attention to the recommendations.

Senator LEVIN. I have one last question before I yield to Senator Boschwitz. I believe you testified that the agency should participate but not be bound. Ms. Beardsley indicated that they should not participate. Do you differ with her in that respect? Do you believe that they should actively participate in the negotiations?

Mr. GAMSE. They used different words but I don't think our meaning is any different. I think we both mean that the agency should be there to help make sure that important issues get raised but they should not get actively involved in negotiation and cannot be bound by the ultimate recommendations because the agency head has to make a decision based on the full record.

Senator LEVIN. In any meeting where the agency has that limited role, would you say that they should yield to the public?

Mr. GAMSE. That is a difficult question. I know from yesterday's hearings one of the witnesses pointed out that making these negotiations open to the public might limit their effectiveness by causing the participants to posture more, to be less open to compromise or the discussions of compromise. I think that that would be a drawback.

I would tend to support the suggestion that Nel Minero made of having them not open to the public but having the public available for summary of the discussions. This would create a situation

where there is a little more freedom of participants to let down their hair and get involved in discussions of compromise without the fear that by participating in those discussions that they are going to be viewed as having let somebody down as part of their interest group.

Senator LEVIN. Senator Boschwitz?

Ms. MINERO. May I comment on that for just a minute?

Senator BOSCHWITZ. Do you want to expand on that?

Ms. MINERO. If I could.

Senator BOSCHWITZ. Sure.

Ms. MINERO. I agree with Roy that it might be easier to reach some consensus if the sessions were closed but I think the relationship of these commissions to advisory committee is important here. We are not certain yet whether they would, in fact, be advisory committees. If they were or to the extent that they were analogous, there is probably some expectation that they would be known.

Senator BOSCHWITZ. That was one of my questions. What the extent of the Government participation should be.

Pardon me for being a little late. I am sorry I didn't hear your testimony although I have read parts of them.

I wanted to ask you, if I might, with the permission of the chairman, just to restate—if I could start with Ms. Beardsley, to restate once again your overview of what you think of the process we are examining. Just a few words for a few minutes to restate what you feel the process of these commissions—or whatever they are going to be called—are being put together. I understand some of the difficulties involved that you pointed out.

Ms. BEARDSLEY. I do support the concept of the commissions. I would very much like to see us try them. I think that we have some practical problems that some of the people have been talking about that need to be worked out. I think the timing of the commissions is very important and I would like to see us have a pilot project or two to test the idea and see if it can work.

Senator BOSCHWITZ. And you, Mr. Gamse?

Mr. GAMSE. I also think that the idea behind the regulatory commissions is a very good idea. I think we got a little bit of experience with similar notions. I would like to see some more. I think there is a question which obviously the committees are very interested in exploring of the very exact Government role. Hopefully with a little bit of a Government push to get these tried out we will learn either that they are not useful—which I suspect we won't find—or that they are useful and the Government should play a fairly routine sponsoring role. I also hope this will be successful enough that this will happen and the various interest groups will perceive that they can get something out of it and some of these will start springing up on their own without the Government's involvement, such as the coal project did.

I think that there are a couple of problems that we have to get passed—some of which were enumerated in the testimony—particularly how this relates to the Administrative Practices Act. EPA will have a particular problem of participating with sponsorship of these commissions because in the RNF-81 appropriation bill on the House side we have a prohibition against intervener funding

which—depending on the exact working of this resolution—might prohibit us from spending money on it.

Senator BOSCHWITZ. Ms. Minero, do you share the views of Mr. Ludlam?

Ms. MINERO. Yes, I do. I am very much in favor with this type of regulatory negotiation. We have experimented a little bit with it.

Senator BOSCHWITZ. Pardon me for asking, but you are not on my list of witnesses?

Ms. MINERO. No, I am not but I do appreciate your asking. [Laughter.] I am counsel to Mr. Gamse.

Senator BOSCHWITZ. Have you concluded?

Ms. MINERO. Just that I agree with what he said.

Senator BOSCHWITZ. What was the problem that Mr. Gamse was testifying about when he talked about the Administrative Procedures Act and then, eventually the Administrative Practices Act?

Ms. MINERO. I believe that we will get the Administrative Procedures Act.

Mr. GAMSE. And the project.

Ms. MINERO. Oh, he also meant the Advisory Committee Act. The problem is first, the Advisory Committee Act prohibits the formation of commissions which are proposed here without specific statutory or Presidential approval; therefore, the resolution must request that the President's Executive order explicitly state that these commissions are permitted under the Federal Advisory Committee Act and, perhaps, even discuss using our current advisory committees to put this into effect.

The Administrative Procedures Act, we have already mentioned the problem with the ex parte context and I have described how I would recommend that we deal with it.

Senator BOSCHWITZ. Mr. Ludlam, you are also not on my list of witnesses.

Mr. LUDLAM. I am counsel with the White House task force on regulatory reform. I am accompanying Ms. Beardsley.

Senator BOSCHWITZ. I see. And you then share her judgment as well?

Mr. LUDLAM. Yes, sir.

Senator BOSCHWITZ. Well, Mr. Chairman, I do believe the witnesses have been very helpful with respect to the governmental participation and how they perceive it. I am very heartened by the fact that they also feel that this is something worth trying. I think it is.

There is a feeling that Government regulators are sitting in office and doing so contemporaneously and arbitrarily and I think they should not only improve regulations, but also improve their attitude with respect to regulations. I think that is very important.

I have no further questions.

Senator LEVIN. Thank you, Senator Boschwitz.

I do have a couple more questions. First of all, Ms. Minero, did you say that you feel we might have to amend the Advisory Committee Act?

Ms. MINERO. No, Senator, I am sure that what I said is that the act might have explicit language in it, that the Executive order explicitly state that these commissions are permitted under the Federal Advisory Committee Act.

Senator LEVIN. Not each commission, but generically all of the commissions?

Ms. MINERO. Or——

Senator LEVIN. Or, we could amend the act in case we receive a response from the executive branch.

I am wondering whether the legal counsel who are with us agree with what Mr. Gamse testified to, that the session could be closed while the agency is participating, even in the limited role that they have, which is essentially one of trying to assist—to make sure the issues are raised?

Mr. LUDLAM. It could be a difference between participating in closed sessions between the notice of comment period or at any time after the comment period. The agency could schedule some meetings at any time before rulemaking or at any time for directors and administrators to talk with people, and there is surely agreements that have been opposed by case law and not by the requirements of the Administrative Procedures Act. None have gone to the agencies unless there is pending rulemaking, depending on the type of rule.

Ms. MINERO. Yes, I agree.

Senator LEVIN. I happen to agree with your cautionary testimony. Yes, there are a lot of questions that have to be answered. I think the trick is to get these commissions regulated in a way that does not destroy their usefulness. I think if they are regulated in the right way they are going to be useful.

Then, the question comes to mind, which part of the Government outside of the agency involved might have the role of selecting the parties and selecting the facilitator and mediator? I think we have to look at other possible uses, too. You mentioned arbitration negotiation, military service, and also private institutions. You may want to look at the universities in Washington, Georgetown, for example, who play a role in one of these. Whether they could expand their role, I do not know.

But, I think the trick here is a voluntary nature of nonparticipation of the agency. That is what we have got to try to work out.

We welcome your comments. Your testimony in particular, Ms. Beardsley, raises all kinds of questions explicitly, questions I would raise one by one at this hearing if we had the time. I would ask you to answer your own questions for us and save us the trouble of sending them to you. We would like the comments of Mr. Gamse and both counsel here about those questions that are raised by you that are not redundant to those already answered. Could we, without any further requests from us, ask that you answer those questions which are enumerated in Ms. Beardsley's testimony that you have not already commented on, or any one that you might wish to comment on further.[1]

We treat this proposal with great seriousness. There is merit to it. If we could do it sensibly we could do great justice to it; but, if we do it clumsily we could strangle it.

So, unless Senator Boschwitz has some further questions, we will excuse this panel and await their further comments.

Senator BOSCHWITZ. Let me just make the comment, Mr. Chairman. I agree with you that these things should not go forward in a

[1]See p. 150.

clumsy manner which might frustrate the results or prevent the more meaningful forward motion of other panels or other commissions in other areas. But, by the same token, we do have some experience and it is important that we do not get so wrapped up in questions that are going to continue to arise and are subjective in form that we get ourselves bogged down. I also agree with the chairman that the panel should take a stab at answering the questions they brought up. Ms. Beardsley brought up a number of questions that we should not allow forward progress to be frustrated on the basis of answering questions and examining and reexamining them. If we do that, then nothing would get done and that would be a shame, particularly in view of the successes that Mr. Gamse pointed out and what we heard yesterday.

Senator LEVIN. In that vein, in your testimony, Ms. Beardsley, you indicated that there have been settlements in a number of cases. You identified the *Massachusetts* case and the case in Maine and I am wondering whether or not the environmental mediators you identified in that paragraph on page 7 were mediators for the agency?

Mr. GAMSE. Let me take a stab at that. In the *Brayton Point* case, the task force that was involved in negotiations was actually set up at a Department of Energy request. At first, there was no mediator. Then the Energy Department suggested that, perhaps, there should be a mediator and all the parties involved should pay for the mediator.

Senator LEVIN. Was the mediator appointed by the Government?

Mr. GAMSE. No, the mediator was, to my knowledge, not associated with the Government. He came from a private consulting firm in Boston. I am pretty sure that he was not a Government employee at the time. I will double check that and get you a response for the record if there is any error in my presumption there.

In the second case, the *Swanville, Maine* case, the mediator was David O'Connor. He had been involved in the issue because he had prepared a study on coal conversion with the group for energy policy which was a concern of the Government. As I understand the process, he sort of fell into the position of a mediator because he was one of the participants and he did not have a vested interest as did the others. It sort of developed that way but he was not originally a mediator. It developed into that kind of a role.

Senator LEVIN. All right, we may have additional questions in addition to the ones that we have already identified. We will keep the record open for answers that are forthcoming.

Thank you all for coming.

Will the next witness please come forward?

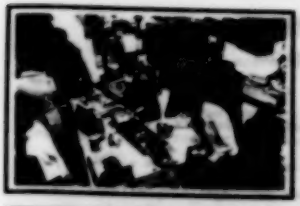
Mr. JOSEPH. Good morning, Mr. Chairman.

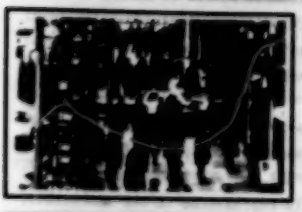
My name is Jeffrey H. Joseph, director of government and regulatory affairs for the U.S. Chamber of Commerce. To my right is M. Kendall Fleeharty, the chamber's associate director for corporate policy and to my left is Mark Schultz, associate director for government and regulatory affairs.

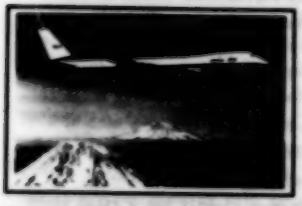
We are all going to participate in our oral statements but ask that our written statement be put in the record in its entirety.

Senator LEVIN. It will be made part of the record and we thank you for summarizing.

[The prepared statement of the U.S. Chamber of Commerce follows:]







Statement of the

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

ON: REGULATORY NEGOTIATION

TO: SENATE SELECT COMMITTEE ON SMALL BUSINESS/GOVERNMENTAL AFFAIRS

BY: JEFFREY H. JOSEPH AND M. KENDALL FLEEHARTY

DATE: JULY 30, 1980

STATEMENT
on
REGULATORY NEGOTIATION
before the
SENATE SELECT COMMITTEE ON SMALL BUSINESS
and the
SENATE GOVERNMENTAL AFFAIRS COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Jeffrey H. Joseph, M. Kendall Fleeharty, and Mark Schultz
July 30, 1980

I am Jeffrey H. Joseph, Director of Government and Regulatory Affairs for the U.S. Chamber of Commerce. With me are M. Kendall Fleeharty, the Chamber's Associate Director for Corporate Policy, and Mark Schultz, Associate Director for Government and Regulatory Affairs. On behalf of our 97,000 members, we greatly appreciate this opportunity to present the Chamber's views on the concept of regulatory negotiation, now under consideration by this committee. Since neither the U.S. Chamber's Board of Directors nor its relevant policymaking committees has had an opportunity to formally study the concept of regulatory negotiations, we have no clear policy or official recommendations to announce today. However, the U.S. Chamber is committed to achieving meaningful regulatory reform. We are grateful to have been invited to testify at the hearings, and to contribute some preliminary thoughts on regulatory negotiations as a possible step toward improving the regulatory process.

The Chamber of Commerce of the United States is the world's largest business federation, composed of more than 93,000 business firms, 2,700 local and state chambers of commerce in the United States and abroad, and 1,300 trade and professional associations. Small business is heavily represented in our membership. In fact, nearly 85 percent of our business members have fewer than 100 employees. Seventy-one percent have less than 50 employees.

In view of these figures, it is fair to say that the U.S. Chamber represents the interests of American business large and small. Some special remarks about small business are in order. Small business is the foundation on which much of America's economic strength and growth has been built. But small business in 1980 is troubled by problems, especially in the regulatory area, that threaten to undermine that foundation. Accordingly, the U.S. Chamber clearly has a vital stake in seeking to improve the regulatory process by reducing the high cost of regulation with which the business community currently is confronted.

REGULATORY OVERVIEW

Today, there is scarcely a corner of business life in which there is not a mandate from a regulatory agency that reflects little sensitivity to the needs of small business and little appreciation for normal profitable business practices. Many regulations simply cost, without adding to the quality of life.

While many federal regulations impose tremendous costs on both the largest and the smallest businesses, smaller concerns cannot achieve the same economy of scale as larger businesses in coping with increasing regulatory and paperwork demands. Quite simply, regulatory and reporting requirements impose disproportionate demands on them. When we discuss possible options for reforming the regulatory process, we purposely assume the perspective of the least common denominator, the small business entrepreneur.

It is impossible for small businesses even to be aware of, let alone comply with, all of the large number of regulations promulgated every year by government. Few owners can afford the professional expertise to interpret regulations and to complete necessary forms; they are forced to perform these tasks themselves.

Whatever the direct cost in dollars, the most critical loss for small business people is that, while meeting regulatory requirements, they are not performing the essential role of running the business.

Additionally, the requirements are a drain on the entrepreneurial spirit of small business which should be able to look to government for support, instead of finding itself in an adversary relationship with government.

Although many proposals have been introduced by Congress and the Carter Administration to reform the regulatory process and to curb regulatory excesses and growth of government, we constantly are confronted with disturbing data indicating that regulatory agencies are growing, not shrinking, in terms of budgets, staffs, and regulations.

The Congressional Research Service did a study last year on regulatory growth. It found that budgetary figures for those agencies with predominantly regulatory functions or with important regulatory functions have tripled since 1970, and in some cases have increased by as much as 7 to 13 times in the past eight years. One agency cited was the Consumer Product Safety Commission, whose budget went from $1 million in 1973 to $40 million in 1978 — an increase of 40 times over a period of six years.

In a recent study, the Center for the Study of American Business noted that the budgeted expenditures for the fifty-six agencies having major regulatory functions had increased from $1.2 billion in 1971 to well over $6.0 billion in 1980 -- a 500 percent increase over the decade.

Judging from these statistics and existing negative public attitudes toward our "fourth branch of government," the time has come to stop complaining, and to start taking steps to reform the regulatory process.

An increasingly cynical and frustrated public is becoming more vocal about the role of government in society. This new public attitude has affected all levels of our government. As a candidate, Jimmy Carter ran against the Washington establishment. The Congress has become more conservative. And current events cause the public debate to escalate.

For example, last year, in a little publicized address to the faculty and students of the University of Kansas, then Attorney General Griffin Bell offered a grim perspective of the state of our nation today. The Attorney General's premise for the speech was that "if the republic is to remain viable, we must find ways to curb, and then to reduce, this government by bureaucracy. We must return to government by directly accountable public officials -- local, state and federal."

Attorney General Bell called rulemaking "a total substitute for all forms of government, executive, legislative, and even judicial. Its abuse can stymie and frustrate the government of whole states and the operations of entire industries."

Consider the observations of the Joint Economic Committee, which, in its 1979 Joint Economic Report, stated that "[a]lthough it would be very difficult to measure the impact of federal regulations on the rate of inflation, ... there can be little doubt that this rapid growth of unnecessary, conflicting, and duplicative regulations in particular, has been a substantial contributor to our current inflation. The growth of such regulatory costs must be brought under control as part of a comprehensive anti-inflation program."

The Attorney General's remarks and the statement by the Joint Economic Committee focus on what the average American businessman is concerned about in government today. Overlap and contradiction among agencies are not uncommon. The proliferation of bureaucratic directives continues to constrain individual freedom in managing business operations. The end results to the consumer are often higher prices and less choice in the marketplace.

And the American public -- the consumer -- recognizes the simple fact that there is "no such thing as a free lunch." In one of the largest surveys of its kind, The Forum on Regulation, an independent Washington-based organization, conducted a public opinion poll on attitudes toward federal regulations. A questionnaire, developed by the Congressional Research Service of the Library of Congress, was distributed to 25 million people by Members of Congress, trade associations, farm and trade journals and the media. Over 2.2 million people responded.

The Survey revealed that:

- 82% felt that federal regulations were not fair to the people affected by them.
- Over 94% agreed that products "cost more" because of federal regulation.
- 95% felt that most federal regulations were "complicated and confusing."
- Over 75% felt that the cost of developing and enforcing federal regulations was "seldom" justified by their benefits.
- 82% felt they "were not" confident that when new federal regulations were issued they were based on proven fact.

As President Carter told Congress in a message accompanying his omnibus regulatory reform proposal, "regulations that add needless costs add to inflation." We could not agree more.

Clearly, we must find an answer to the dilemma of excessive and inappropriate regulation. The U.S. Chamber has vigorously supported a number of bills to reform the regulatory process and provide relief for small business. For example, we support the concept of government-wide Congressional review and possible veto of agency regulations, sunset review of agencies and programs, stricter judicial review of agency actions, regulatory flexibility, fee shifting, and wide-scale reform of the rulemaking process. We continue to urge passage of a number of bills containing these concepts. However, as much as these administrative reforms are needed, there remains an essential need for regulatory change from within the regulatory process. New statutory changes would fall far short of accomplishing all the reform that is necessary.

Regulatory negotiation may constitute one method of creating change from within an agency. Ideally, negotiation would constitute both a regulatory process and a regulatory goal. As a process, regulatory negotiation would bring all affected parties together in an effort to resolve key disputes and to establish a

helpful dialogue, before an agency issues a proposed rule. To the degree that the negotiation process is successful, the ultimate regulation issued by the agency stands a higher chance of public acceptance. The goal of a regulatory agency should likewise be to implement a Congressional act effectively, yet efficiently, into society. Once again, negotiation should provide a vehicle for attaining that goal.

THE NEED FOR A NEW REGULATORY PROCESS

As currently practiced, the regulatory process is essentially adversarial. It is essentially a legalistic and antagonistic undertaking in which every side presumes the worst about the other. The process creates a game which pits the agency against the business sector, the courts against the agencies, and occasionally the agencies against the Congress. As in any game, there is every incentive to seek delay for your opponent and partisan gain. There is no incentive for reason, cooperation, or mutual understanding. The result is often regulatory overkill and counter-productive government.

This is not to say that the adversarial approach has no role in the regulatory process. Whenever there are conflicting interests, advocates for those interests will be expected to develop their arguments and frame their positions as forcefully as possible. The nature of the process today, however, goes beyond mere adversarial argumentation. Small business, which must be able to look upon government for support, now views government as an antagonist.

The quality of the nation's economy would appear likely to improve if the regulatory process itself improved. Negotiation could play a role in improving regulations in a number of ways. Currently, many key regulations are aimed at design features rather than performance standards -- they are aimed at means rather than at end results. This can be needlessly costly. In the field of worker safety, for example, rigid OSHA design standards continue to frustrate employers and employees alike, and can be counterproductive to the overall objective of protecting workers. Because these standards often do not conform to the realities of a particular work site, their enforcement can be meaningless and can polarize the regulator and the regulated. Zealous policing of standards that are inappropriate and useless when applied at a particular site also detracts from industry's own safety and health efforts. OSHA has not, in nearly a decade, fully grasped the need for flexibility in its enforcement.

Design standards present many problems: smaller firms are disproportionately affected; funds from what should be higher priority safety and health efforts are sapped; technology tends to be frozen; standard-setting is slower; and work sites with different characteristics are arbitrarily forced into one mold.

The Occupational Safety and Health Administration is also periodically confronted with industry requests to allow protective clothing and equipment instead of building engineering controls to shield workers from certain toxic chemicals. Had a policy of regulatory negotiation currently been in place, OSHA's original regulations might have adopted a commonsense approach like this from the start.

OSHA has also proposed safe noise levels for employees that would foreclose the use of some types of personal protective equipment and would instead mandate extremely expensive retrofitting of muffling attachments on plant equipment. Industry pleas for an approach that would allow them to outfit employees with ear covers to protect them from the noise appear to have fallen on deaf regulatory ears.

In all three cases, the initial approach of the regulators was fantastically and unnecessarily inflationary. The agencies routinely failed to seek out the regulatory scheme with the lowest compliance costs and thus indirectly diverted significant corporate assets away from productivity-related activities.

When business and regulator work together, novel solutions have been seen to emerge. Last December, the Environmental Protection Agency adopted an innovative approach to regulation that had long been sought by the steel industry and other business sectors. The EPA approved the "bubble concept," in which a manufacturer can draw an imaginary bubble around its plant and treat it as a single source of emissions coming from various sources within the plant. The mix of engineering solutions to control the emissions is chosen to be the most cost-effective. This approach makes the goal of pollution control economically attainable by whatever means a plant may choose. As technologies, and as corporate policies shift, the company may have some latitude to alter its clean air "recipe" and still remain operational within the law.

If negotiation were able to apply reason to the regulatory process, resulting regulations might be in closer synchronization with Congressional intent behind the laws the agency is administering. Through negotiation, regulatory thinking might be ventilated by the clean air of common sense and business

practicality. There would be less need for business to resort to Congress to invalidate agency rulemaking, as occurred recently when Congress clipped the regulatory wings of the Federal Trade Commission. Under optimal conditions, business and agencies would cooperate together to implement Congressional statutes in ways that best reflect the intent of the legislature.

Negotiation could conceivably also save vast sums in litigation expenses to both the private and public sectors. Under current practice, businesses suffering under onerous rules can challenge those rules in Congress or in the courts. However, recourse to the judicial process is not an ideal solution to regulatory reform. Where the judicial branch must interpret an agency's regulations and also interpret Congressional intent behind the law, the small businessman ends up with a ruling several steps removed from Congress. The negotiation process -- beginning before the start of agency rulemaking -- should result in fewer judicial challenges to the end product. To the degree that this succeeds, legal fees can be spared. For our small business members, this would constitute a significant savings.

THE CAUSES UNDERLYING THESE PROBLEMS

Over the past decade, most regulators have behaved more like social architects than technicians interpreting the law. Agency heads and agency staffers alike have often been chosen because they are adversarial and not because they are open-minded. This breed of regulator has been personally committed to implementing a minority social or economic viewpoint upon an entire economy, and has avoided coming to terms with the fact that America is a pluralistic society with a complex economy that is daily being challenged by competition from abroad. The U.S. Chamber is currently engaged in a comprehensive review and analysis of the regulatory appointment process. We hope to produce substantive findings and recommendations which will be endorsed by a broad spectrum of interests in time for use by presidential candidates in planning their administrations.

A recent sampling of key regulatory and White House staff helps to demonstrate why regulators have injected an adversarial attitude into the work of their agencies. Susan King, Chairman of the Consumer Product Safety Commission, formerly headed the Center for Public Financing of Public Elections. Eleanor Holmes Norton, EEOC Chairman, was from the American Civil Liberties Union. Katherine Fletcher, formerly of the White House Domestic Policy staff, served with the Environmental Defense Fund. Barbara Blum, EPA Deputy Administrator, came from the Georgia environmental movement. Joan Claybrook, head of the National Highway Traffic Safety Administration, served with the Nader organization, Congress Watch. Bert Cottine, a member of the Occupational Safety and Health Review Commission, was also a Nader activist. John Froines, deputy head of the National Institute for Occupational Safety and Health, was one of the famous Chicago Seven of anti-war protest days. James Moorman, Assistant Attorney General, came from the Sierra Club. Al Kramer, Director of the FTC's Bureau of Consumer Protection, came from Citizens Communications Center. Carol Tucker Foreman, an Assistant Secretary of Agriculture, came from the Consumer Federation of America. The list could go on.

Like any institution, a regulatory agency becomes jealous of its turf, hungry for added jurisdiction, and ambitious to innovate and to create policy. In its work, the agency becomes overzealous. What is more, regulatory agencies are very hard to supervise and control. Congressional oversight is infrequent and detracts from Congress's other duties. While the White House can exercise

some control over executive branch regulators, independent agencies are not subject to its executive orders. And even if these agencies were, the devices for regulatory reform now in place have not, in the past, addressed regulatory negotiation.

Negotiation might offer some means to homogenize the regulatory process in all agencies -- executive branch and independent alike -- without compromising the individuality of each agency and the particular regulatory burdens before it.

Another cause underlying the adversarial nature of rulemaking is that agencies frequently or customarily propose rules far broader than they intend to issue, with the idea of paring them back later. Often this strategy backfires. As a case in point, the Federal Trade Commission recently proposed rulemaking in the field of children's advertising. Several different possible remedies were proposed, running the gamut from controversial to outrageous. Hearings were then conducted on the general subject matter of children's advertising, and the Commission's Chairman, Michael Pertschuk, went on the stump preaching the evils of the nation's advertising and broadcasting community. The adversarial pitch had risen so high that one court disqualified Chairman Pertschuk from further participation in the rulemaking based upon his clear personal bias, although this ruling was subsequently overturned on appeal. At the same time that the children's advertising proceeding was in progress, the FTC was at various stages of rulemaking in the area of product standards, funeral practices, and used car warranties. Furthermore, Chairman Pertschuk was forced to admit in oversight hearings before the Senate Commerce Committee that FTC staffers working on some of these projects had engaged in "vendettas" against the affected industries.

In each of these cases, and at the insistence of Congress, the agency was compelled to fall back to far more limited regulatory proposals. Either the agency was seeking to feather its own nest with regulations far in excess of its statutory power, or the agency was merely conferring upon itself an adversarial advantage at the starting point by proposing a regulation far more excessive than any it ultimately wanted or expected to achieve. Either way, the agency fanned the adversarial fires by its approach. The ultimate effect of this kind of regulatory action is an open invitation to the business community to contest the rulemakings within the rulemaking process, through the Congress, and ultimately through the courts.

Other agencies have followed the same pattern. For example, the Securities and Exchange Commission has, over the past couple of years, proposed a number of rules by which it would confer upon itself novel authority to control boardroom behavior. Most of these rulemakings were either significantly modified or abandoned altogether due to the weight of adverse public reaction. For example, the SEC has issued rulemakings in the area of proxy card revisions which had to be scaled back. Similarly, the agency's regulations on management remuneration disclosure were initially scaled back and were even further modified thereafter. These actions suggest to us that the SEC, through the rulemaking process, sought not to implement its statutory duties nor to advance the public interest, but rather, sought to increase its administrative clout and base of influence through liberalized interpretations of its Congressional mandate. When rulemaking is used to serve the territorial interests of an agency rather than to serve the will of Congress, the seeds of antagonism are sown. Regulatory negotiation, if it were made a mandatory element of administrative law, might well defuse the antagonisms that otherwise result when agencies unilaterally issue ambitious regulatory proposals. To the extent that negotiation could prevent unwanted rulemaking, it might serve an invaluable purpose in improving the regulatory process while also heading off antagonisms from the start.

We must also point out that instability at the commissioner level of most agencies also contributes to the adversarial nature of the current rulemaking process. The average tenure of an agency head or commissioner is now two to three years. The political nature of the appointment process results in inexperienced regulators and a frequent turnover of appointees. A great deal of learning time is necessary to bring new commissioners up to speed, and the desire on the part of new appointees to till new policy ground rather than merely oversee agency staffs creates an atmosphere in which staffs run regulatory agendas more independently than may be desirable. With staff members often proposing new regulatory schemes, running the hearings, and recommending to the commission their final rules, agency heads give the appearance of doing little more than rearranging the proverbial deck chairs on the regulatory Titanic, while rules and regulations spill into the Federal Register at increasing rates. Negotiation might help to stabilize the process and anchor rulemaking to realistic objectives. The process of involving the business community, labor, consumer groups, and regulators themselves ought to give some continuity and

balance to the regulatory agenda and to the design of each individual regulation.

Surprising though it may seem, agency hiring practices may contribute significantly to the adversarial nature of rulemaking. Agencies tend to hire attorneys without job experience in any particular industry and proceed to loose them on a sector of the economy with which they have no familiarity. Some of these attorneys, typically not long out of law school, are eager to make a name for themselves and to turn their assignments into job specialties when they later take up a private law practice. For these attorneys, the central goal is not to serve the public interest, nor to develop wise, effective, yet restrained regulations. Yet, regulatory negotiation ought to begin on this very premise of effectiveness with restraint. Negotiation might also wrest sole control of rulemaking away from lawyers and place it in the combined hands of engineers, scientists, marketing experts, individuals experienced in the relevant business sector and others knowledgeable about the effects of proposed rules.

INDUSTRY RESPONSE TO REGULATORY PROCESS

Given the manner by which overzealous regulators have chosen to perform their work, it is not surprising that industries' response to the regulatory process is so very often negative. A look at what that process has done to the steel and auto industries provides a microcosm for what regulation has done to the small business sector generally and to the economy as a whole.

The impact of government regulation on the domestic iron and steel industry was documented by the Council on Wage and Price Stability in 1976 when it found "a picture of an industry that could hardly move without taking into account the wishes or directives of some federal agency." The Council asserted that

> "Steel is an industry whose production procedures are to some extent prescribed for it by government, whose costs are substantially influenced by government, whose market share exists at the sufference of government, and whose profitability has a good deal less to do with innovation and enterprise than it does with what government decides to let it keep."

According to the Council, in 1976 the industry was subject to more than 5,600 federal regulations (affecting actual steelmaking operations only) and had 27 federal agencies watching over its shoulders, often with overlapping regulatory domains. The cost to the taxpayers of maintaining the regulatory bureaucracies and to industry for the actions it would not have taken in the absence of regulation, are the most visible burdens of regulatory action.

The paperwork burden reported by one steel firm for 1978 was 92,000 pages of reporting to 112 agencies of various levels of government, federal, state and local. Another large firm reported that in 1975 it had to apply to 379 agencies for licenses or permits, had to report to 1,245 different agencies, was required to maintain correspondence with 1,026 agencies. This burden affects nearly every area of company operations. The same large steel firm noted in 1975 its financial department was obligated to report to 308 agencies, its research laboratories to 13 agencies, and its international operations to 9 different U.S. agencies.

These burdens of regulation, as the Council pointed out, show up most dramatically in the decline of productivity. From 1960-1978, the U.S. steel industry was "dead last" in spending for new tools and growth of output per worker hour compared with Japan, West Germany, Canada, France, Italy, and the United Kingdom.

Currently, the average age of steelmaking equipment is 17.5 years. While foreign competitors build modern energy-efficient steel plants, the U.S. is slipping further and further behind. Much of the money needed for modernization is being drained off to meet the requirements of environmental and safety laws. From 1951-1978 steel had invested $3.7 billion (in 1978 dollars) for environmental control facilities. Compliance with long-term air and water regulations for existing plants and equipment will require capital expenditures of at least $600 million per year through 1985 for a total of $4 billion. This does not include cost estimates for either the requirement of zero discharge of water pollutants or for post-1985 air standards. An additional $3 billion may be required for these, bringing the yearly average for environmental control to $700 million.

Occupational safety and health rules for noise, lead, sulfur dioxide, benzene, and carcinogens indicate that another $100 million per year will be necessary to comply with these requirements. OSHA's mandate for specific

engineering controls and work practices, such as established in the Coke Ovens Emissions Standard, has created significant difficulties. Engineering or work practice controls have caused decreased productivity and resulted in potential violation of either environmental agency consent agreements or other OSHA standards.

While steel may sound like big business, regulatory impediments to the steel industry are felt by small businesses alike. Small businesses comprise a significant share of purchasers and suppliers, and they provide related business services to large steel companies. When steel suffers, so do these small business affiliates.

Certainly, excessive government regulation of the auto industry has a severe impact on small business as well. General Motors, the largest of the big three automakers, supports as many as 40,000 small business suppliers, not including the thousands of other small business dealerships and other companies financially independent from GM but yet dependent upon GM for their welfare. In 1979 alone, GM was forced to spend $1.9 billion to comply with government regulations at the federal, state and local levels. GM's regulatory costs in 6 years, 1974-1979, totaled more than $8 billion, an average of about $1.3 billion per year.

The diversion of these billions from capital investment could not have come at a worse time, when the automakers are faced with the critical need to retool facilities to manufacture smaller vehicles. Chrysler President Lee Iacocca estimates that "more than three-forths of our discretionary funds are now committed to meeting government programs." In the past 10 years, the U.S. auto industry has increased capital investment by 250 percent, but — Iacocca says — "it's gone to meet government regulations. We are being pressed to the wall by our own government." Industry experts predict that automakers may have to spend $60 billion in capital investment in the next 4 or 5 years to meet government regulations.

As the expenses increase, so do contradictions and doubts that the benefits are commensurate with the costs. For example, Federal law requires that cars built after September 1, 1973, have passive seatbelt restraints or airbags, yet the General Accounting Office has questioned the effectiveness of airbags and said they will cost as much as $580 per car rather than the $112 quoted by the National Highway Traffic Safety Administration. Similarly,

increasingly strict emission standards are raising costs considerably, while the public health benefits — GM, for one, asserts — "appear extremely small and questionable."

Fuel economy requirements also appear to be running afoul of the law of diminishing returns. While raising the requirement from 16 to 17 miles per gallon saved 55 gallons of gasoline per car per year, going from 26 to 27.5 as required in 1985, will save only 21 gallons and cost the industry a billion dollars. Ford Motor Company has warned that this requirement "will press us to the limit."

While small businessmen may be devastated by overregulation, they are, by virtue of their size, also far less capable of affecting the regulatory process than their large business brethren. An attitude of suspicion and ultimate cynicism has begun to color the relationship of businessmen to regulators. All sides agree that cooperation would be preferable. Yet, what small business can be expected to share its experiences and internal information with the regulatory body which acts unilaterally and which might later use that information in enforcement proceedings against the unsuspecting business. What incentive is there for a small businessman to talk to a bureaucrat who has never worked in his industry and for whom he has given up all expectation of meaningful communication. Under the current process, can a small businessman be faulted for telling a regulatory agency, "I'll send my lawyers to talk to your lawyers." This process may be counterproductive and very expensive in the long run, but, unfortunately, there may be no alternative when regulators regulate the way prosecutors prosecute. Pilot programs in regulatory negotiation, however, may represent a useful device for turning the corner on these attitudes.

Business has already led the way. Several pilot programs have already been undertaken to bring negotiation and multiple perspectives into the regulatory process. For example, several years ago the U.S. Chamber cosponsored a conference with the Consumer Federation of America to provide a better understanding of federal regulation of consumer product warranties. Politics, it is often said, makes strange bedfellows. The U.S. Chamber and the CFA at that time, and today, have numerous conflicting legislative and policy goals. Yet, the problems associated with federal regulation of consumer product warranties created the basis for negotiation and cooperation on the part of these diverse organizations.

Congress has instructed the Federal Trade Commission in January, 1975, to promulgate regulations defining the rights and responsibilities of those consumer

product manufacturers offering "full" written warranties. The FTC's inability to meet this Congressional deadline brought both the Chamber and CFA together as they sought to air this issue in hope of expediting the rulemaking. While our two-day conference fully explored the subject and was well received by all sides, it was still not a success. As of this date, more than five years after the Congress's mandate to the agency, the FTC has still not promulgated their final regulations. Through the U.S. Chamber/CFA Warranty conference, the public was shown that the battle could be won. Diverse groups could sit down and negotiate their specific problems with a pending federal regulation. However, the agency still lost the war by not quickly picking up the issue, as it was narrowed by the conference, and moving it forward for final action.

A logical outgrowth of this program was a dialogue directly with the FTC on a whole host of subjects. Following the recent battle of the Federal Trade Commission over its authorization, the U.S. Chamber initiated a public dialogue with FTC Commissioners and key division heads on the general issue of future regulations. At that meeting, last January 31, FTC Chairman Pertschuk, Commissioner Bailey, Bureau Directors Dougherty and Kramer, and Policy Planning Director Reich met with an equal number of representatives of the U.S. Chamber of Commerce. The purpose in meeting was to create better lines of communication between the business community and the FTC, to establish a vehicle for business input into the regulatory process, and to help correct misperceptions that either side may have about the other's position. Topics discussed in that session parallel the concepts being discussed in these hearings: the need for a better pre-regulation dialogue; less animosity on the part of business and government; better research supporting agency hypothesis. These kinds of issues can be easily addressed by regulatory negotiations. The initial dialogue proved to be very constructive, and additional meetings are planned. These future public meetings are anticipated by all parties to develop less burdensome regulations that advance the public interest.

Other business groups have also begun negotiation experiments with the federal government. Thirty-three food processors have financed a new Food Safety Council governed by a board of directors equally divided between industry and public members. The Council operates through two committees: one on ingredient testing, and the other on evaluating the public policy considerations that go into risk/benefit judgments.

These hearings have already explored the work of the National Coal Policy Committee. These and other agency negotiation experiences ought to be examined as well for their strengths and weaknesses and their successes and failures.

PROGRAM DESIGN FEATURES

Funding and control mechanisms for negotiation programs may be critical in determining how successful those programs can become. Budgeting for the National Coal Policy Program came almost wholly from the business sector. Regulatory agencies have the duty to ensure that their regulations are based upon a complete and thorough understanding of the industry they regulate. A properly designed negotiation program might help to ensure that an agency is meeting its duties of self-education. The Chamber has long supported the involvement of citizens and businessmen in the regulatory process. In the past, agencies have relied upon hosting regional hearings on proposed regulations, though these have generally occurred after regulations have been issued for comment. Negotiation would step up the process of citizen input to the pre-drafting stage of any regulation.

Because our policy-making committees have not yet explored this concept, the U.S. Chamber cannot make any formal recommendations regarding funding.

Design and control of the program in any agency must also be carefully considered. Should the U.S. Chamber develop policy to support regulatory negotiation as a concept, we would like to reserve the opportunity to submit detailed comments later for the record on how a proposed program might be structured and managed. For the purposes of further analysis, we will be happy to provide the Small Business and Governmental Affairs Committees with details on how the Chamber's pilot programs have operated and on how such programs might be integrated into any model that may emerge from these hearings.

CONCLUSION

The notion of regulatory negotiations is novel. It has not been extensively tested, nor is it clear that it offers a significant opportunity to improve the regulatory process across-the-board. However, it may represent a constructive start and these hearings are a welcome exploration. It is widely recognized that paperwork requirements, compliance costs and the capital costs of regulation have seriously damaged American productivity and market dominance in world trade.

It is also acknowledged that small business is hurt by overregulation to a disproportionately greater extent than larger businesses. And it is universally recognized that regulatory reform is critical. With all of the dynamics pointing toward adversarial relationships and counter-productive interactions in current models of the regulatory process, we must all look for new ideas and experiment with novel mechanisms to get the system back under control. The U.S. Chamber will do everything it can to work with the Congress and the regulatory agencies to accomplish meaningful reform in the public interest. We appreciate this opportunity to have given our initial thoughts on one such possible new mechanism. Thank you.

STATEMENTS OF JEFFREY H. JOSEPH; M. KENDALL FLEEHARTY; AND MARK SCHULTZ, U.S. CHAMBER OF COMMERCE

Mr. JOSEPH. We have a very deliberate policymaking process at the Chamber of Commerce, but since neither the board of directors nor its relevant policymaking committees has had an opportunity to formally study the concept of regulatory negotiations, we have no clear policy or official recommendations to announce.

Our policy process is an intricate one, and we do have input from all sectors of our membership; but that does not mean we feel we know enough yet, or have a feel or a flavor of what we are trying to accomplish in regulatory negotiation to come out with an official position.

Regulatory reform, however, is something we are all striving to seek, and we have had a number of opportunities to do what we can as a business-representing organization.

There are a lot of intricate questions that have been raised in your formal resolution about the "Reg Neg" commissions, how they would be financed, how their relation to regulatory agencies would be structured.

We appreciate the Senate Small Business Committee and the Senate Governmental Affairs Committee coming together to explore this issue. Both Senate committees have a long history of legislation that affect very seriously small business.

I would like to emphasize that nearly 85 percent of our business members have fewer than 100 employees and 71 percent have less than 50 employees, so we are very concerned about regulations that do affect business in general and especially the small business sector, which has a disproportionate load in trying to conform to them.

It is a sad thing that for small businessmen in dealing with Government, they find themselves in an adversarial position rather than looking to the Government for support.

We do support, as you know, a number of different statutes to reform the regulatory process, and for the record I would like to state that we do support the concept of Government-wide congressional review and possible veto of agency regulations, sunset review of agencies and programs, stricter judicial review of agency actions,

regulatory flexibility, fee shifting, and wide-scale reform of the rulemaking process.

However, as much as these administrative reforms are needed, there remains an essential need for regulatory change from within the regulatory process. New statutory changes would fall far short of accomplishing all the reform that is necessary.

Regulatory negotiation may constitute one method of creating change from within an agency. Ideally, negotiation would constitute both a regulatory process and a regulatory goal.

As a process, regulatory negotiation would bring all affected parties together in an effort to resolve key disputes and to establish a helpful dialog before an agency issues a proposed rule.

Now, as to the need for a new regulatory process, I would like Mr. Fleeharty to give you a summary of our thoughts.

Mr. FLEEHARTY. Thank you.

Mr. Chairman, as currently practiced, the regulatory process is essentially adversarial.

It is essentially a legalistic and antagonistic undertaking in which every side presumes the worst about the other.

The process creates a game which pits the agency against the business sector, the courts against the agencies, and occasionally the agencies against the Congress. As in any game, there is every incentive to seek delay for your opponent and partisan gain. There is no incentive for reason, cooperation, or mutual understanding. The result is often regulatory overkill and counterproductive government.

First, over the past decade, most regulators have behaved more like social architects than technicians interpreting the law. Agency heads and agency staffers alike have often been chosen because they are adversarial and not because they are openminded.

This breed of regulator has been personally committed to implementing a minority social or economic viewpoint upon an entire economy, and has avoided coming to terms with the fact that America is a pluralistic society with a complex economy that is daily being challenged by competition from abroad.

Second, like any institution, a regulatory agency becomes jealous of its turf, hungry for added jurisdiction, and ambitious to innovate and to create policy.

What is more, regulatory agencies are very hard to supervise and control. Congressional oversight is infrequent and detracts from Congress other duties.

While the White House can exercise some control over executive branch regulators, independent agencies are not subject to its executive orders. And, even if these agencies were, the devices for regulatory reform now in place have not, in the past, addressed regulatory negotiation.

Negotiation might offer some means to homogenize the regulatory process in all agencies—executive branch and independent alike—without compromising the individuality of each agency and the particular regulatory burdens before it.

A third cause underlying the adversarial nature of rulemaking is that agencies frequently or customarily propose rules far broader than they intend to issue, with the idea of paring them back later. Often this strategy backfires.

As a case in point, the Federal Trade Commission recently proposed rulemaking in the field of children's advertising. Several different possible remedies were proposed, running the gamut from the controversial to the outrageous.

Hearings were then conducted on the general subject matter of children's advertising, and the Commission's Chairman, Michael Pertschuk, went on the stump preaching the evils of the Nation's advertising and broadcasting communities.

The adversarial pitch had risen so high that one court disqualified Chairman Pertschuk from further participation in the rulemaking based upon his clear personal bias, although this ruling was subsequently overturned on appeal.

At the same time that the children's advertising proceeding was in progress, the FTC was at various stages of rulemaking in the areas of product standards, funeral practices and used car warranties.

In each of these cases, and at the insistence of Congress, the agency was compelled to fall back to far more limited regulatory proposals.

Either the agency was seeking to feather its own nest with regulations far in excess of its statutory power, or the agency was merely conferring upon itself an adversarial advantage at the starting point by proposing a regulation far more excessive then any it ultimately wanted or expected to achieve.

Either way, the agency fanned the adversarial fires by its approach. The ultimate effect of this kind of regulatory action is an open invitation to the business community to contest the rulemakings within the rulemaking process, through the Congress, and ultimately through the courts.

Regulatory negotiation, if it were made a mandatory element of administrative law, might well defuse the antagonisms that otherwise result when agencies unilaterally issue ambitious regulatory proposals.

To the extent that negotiation could prevent unwanted rulemaking, it might serve an invaluable purpose in improving the regulatory process while also heading off antagonisms from the start.

Fourth, we must also point out that instability at the commissioner level of most agencies also contributes to the adversarial nature of the current rulemaking process.

The average tenure of an agency head or commissioner is now 2 or 3 years. The political nature of the appointment process results in experienced regulators and a frequent turnover of appointees.

With staff members often proposing new regulatory schemes, running the hearings, and recommending to the commission their final rules, agency heads give the appearance of doing little more than rearranging the proverbial deck chairs on the regulatory Titanic, while rules and regulations spill into the Federal Register at increasing rates.

Negotiation might help to stabilize the process by involving the business community, labor, consumer groups, and regulators themselves. It ought to give some continuity and balance to the regulatory agenda and to the design of each individual regulation.

Fifth, surprising though it may seem, agency hiring practices may also contribute significantly to the adversarial nature of rulemaking.

Agencies tend to hire attorneys without job experience in any particular industry and proceed to lose them on a sector of the economy with which they have no familiarity. Some of these attorneys, typically not long out of law school, are eager to make a name for themselves and to turn their assignments into job specialties when they later take up a private law practice.

For these attorneys, the central goal is not to serve the public interest, nor to develop wise, affective, yet restrained regulations. Yet, the regulatory process ought to begin on this very premise of effectiveness with restraint.

Negotiation might also wrest sole control of rulemaking away from lawyers and place it in the combined hands of engineers, scientists, marketing experts, individuals experienced in the relevant business sector and others knowledgeable about the effects of proposed rules. Under the current process, can a small businessman be faulted for telling a regulatory agency, "I will send my lawyers to talk to your lawyers." This process may be counterproductive and very expensive in the long run, but, unfortunately there may be no alternative when regulators regulate the way prosecutors prosecute.

Some pilot programs in regulatory negotiation may, however, demonstrate that it represents a useful device for turning the corner on these attitudes. Some experiments have been well underway, and Mr. Joseph will describe some of these experiences.

Mr. JOSEPH. The U.S. Chamber has had some groundbreaking experiences in negotiating with regulatory agencies. I remember back in 1973 when the Consumer Product Safety Commission was just getting started. The public was just getting used to the idea of functioning from the adversarial standpoint, so that our members concerned about this new agency wanted to know if there could be some way to have a dialog with them and wanted to talk from the standpoint of, "Let's sit down and try to air our concerns before a number of regulations come running out of this agency," was the thought. We did work together for 2 successful years with those agencies, sitting down on an annual basis. They met with us and the record shows the basic suggestions we gave to them, and these helped them steer clear of a lot of additional problems they might have brought on themselves.

More specifically, in 1974, the Congress mandated the Federal Trade Commission to define what product warranties must be given on a written basis, and that took something like 5 years. In 1977, because business did not know what a "full warranty" was, and consumer groups did not know what a full warranty was, there was a dialog between the Consumer Federation of America and the U.S. Chamber of Commerce members to allow the FTC to have the benefit of some crystalized thinking on this issue, as well as at the Office of Consumer Affairs of the President and also by the George Washington University. We had a 2-day conference, and we narrowed down all of the relevant issues before the FTC. The groups were looking at a 2-year deadline, and it is now 5 years later, and the FTC still has not finished that particular regulation. But, a

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statement did come out with the FTC's final regulatory proposal recently, and I think the finalized regulation will be helpful with regard to warranties.

But, certainly, there has been much publicity about the contributions that dialogs between the U.S. Chamber of Commerce and the Federal Trade Commission have made, and we still feel an increase in improvement is likely.

In an initial dialog, we talked about the same thing that you are concerned about here, how to expedite the rulemaking process, what to do about the ex parte considerations. Those are things that business is discussing right now with the Federal Trade Commission.

Businessmen have found it constructive to come on our field trips where we host groups of people from visiting agencies in town hall-type formats. They meet with the regulators face-to-face and talk about the kind of real world problems they have. Each side gets a good perception of the other's situation, and we are going to continue these face-to-face exchanges.

With this background, we plan to take the total concept of regulatory negotiations—the process as you have detailed it—to our policymaking committees, and we will report back to you, including how we think a formal process should be structured. But, I would like to turn this over to Mr. Schultz, on my right, for some additional comments.

Mr. SCHULTZ. I will be very brief in my testimony.

As you heard from the last panel of witnesses, we have been observing a great deal of informal rulemaking, caused by a lot of legislation passed by Congress and brought to regulatory agency heads for implementation. A great deal of thought and consideration has recently been given in Congress to the veto and other concepts to try to achieve rapport between Congress, independent agencies, and the executive branch of Government.

In the process, it became clear that there was a lot of legislating being done by the regulators. In fact, a recent court decision reinforces the point that when you are engaging in formal rulemaking, you are, in fact, legislating.

We have been actively involved, as other groups have been, with the reconciliation proposal—S. 262—something you are very close to, Senator Levin. The White House, the Senate Governmental Affairs Committee and the Senate Judiciary Committee were good enough to share copies of draft legislation and to work with us on the bill. To some extent, that was accomplished.

There were important issues that were not resolved at that time, and throughout there was a reconciliation process, particularly at the Senate Judiciary Committee level.

Later, labor, consumer, environmental and business groups met to try to effect a compromise on dealing with regulatory analysis and judicial review of that analysis and it remained a court provision throughout this period.

Also, at that time, a compromise was struck with respect to some very emotional issues, and one with intervenor funding, as well. It was agreed that that arrangement would carry through to the committee process.

I think the point that we want to make is that the negotiation surrounding the regulatory reform bill serves as a satisfactory prototype, something in the future, not only with respect to legislation but with respect to regulation. We feel the time has come for the rulemaking process to be a little more like the legislative process and a little less like the judicial process.

We see no reason why business leaders cannot be provided with informal drafts, advanced copies of proposed regulation, so that agencies can work closely with us and with others to try to reconcile our differences at an early stage, before we get locked into difficulties.

We have tried on occasion to get advanced copies of proposed regulations. We feel that if we can work with the staffers on the Hill, we should be able to do the same kind of thing in the regulatory process.

We stand ready and willing to do that. We will answer any questions any of you might have.

Senator LEVIN. We thank you, first of all, for coming. Your testimony has been very helpful.

I have a couple of areas I would like to question you on your particular testimony. One is the question of negotiating of the agencies as you put it, Mr. Joseph, and the other one has to do with the relationship between regulatory rules and intervenor funding, whether or not there is some conduct as one of our earlier witnesses pointed out.

But, first, at least, as I perceive this proposal, it is not a proposal involving negotiating with agencies. It involves the parties that might otherwise be at odds in negotiating with each other, not involved with an agency in a very active way because of a number of problems that have been pointed out.

I think your emphasis is if your association would be part of that process in a much more active way, I presume you are talking about what we have in front of us.

My question is really do you perceive in this process that the agency would select and facilitate a mediator, a person who would play a relatively active role with the substance of the negotiation?

Second, do you perceive the agency would select its own party to participate in negotiations, and if your answer is yes to either of those two questions, either a yes or a qualified yes, do you see legal questions being raised when they come out with rulings?

Mr. JOSEPH. First, let me say Senator Levin, that we have no formal policy on this, so I cannot clearly say the chamber would recommend one thing or another.

I do think that there are some parallels which need to be looked at. Obviously, an agency is going to be the ultimate voice of what a regulation is, so there has to be some coordination in what is going on in terms of trying to reach a consensus between parties. The people in the agency are going to have to put their staffs on it.

You have something that is not the same but, perhaps, parallel to the process that was newly tried by the Consumer Product Safety Commission in 1973-74. It has not worked very well.

The concept was that when an agency decided a particular regulation or mandatory standard was necessary in a particular area,

they would take bids from different groups who wanted to develop it, and they would sanction one group to take the responsibility.

Basically, it was a lot of headaches for all the parties. The question was always whether the agency picked the right party. The people who weren't picked were critical of the work produced. Everyone jabbed the other and the agency came back and said, "We don't like what you are doing in developing this." This created problems in expediting the rulemaking process and, in fact, it loaded it down.

I do think that it makes no sense to negotiate with people exclusively on the outside, to come up with something and then take it to the agency without having any idea ahead of time of what the agency would think about it.

It is not going to be easy to reach a consensus on a given regulatory issue, and I think there needs to be some sort of knowledge of the people who have to make the ultimate decision.

We cannot give a formal recommendation yet, but we will be pleased to give you the benefit of our thinking as soon as we possibly can.

Senator LEVIN. That would be helpful to us. I see great problems presenting information to the agency.

I would not press the point except to ask the question this way: Let us say that the negotiation process was a mechanism by which we facilitated outside parties to getting together and let's say those outside parties come together to try to make joint recommendations to the agency but without agency participation in that process. They will come up with negotiating language that would carry weight, but as a practical matter with the agency would that process, in your informal opinion, be of value, excludes the agency from participation in the negotiating process?

Mr. JOSEPH. With clearly knowledgeable people, whether you do it with a university or in a conference forum, negotiation would seem to be helpful to an agency in deciding where it is going to go. This really shortcircuits their normal process and, yes, it is a benefit. The first couple of times, it would be easier to bring other groups together to pursue these kinds of things.

But, Washington is a funny town. A lot of people do not move on blind faith. It would take a lot of belief by these parties that it is worth their while because it is a complex question. Various groups will have members which will be taking issues to court. You have got to have enough carrots to pull the people in.

Mr. FLEEHARTY. Our own thinking on how the process would work is that, first and foremost, the agency has to educate itself on the proposed regulation, and we see that the agencies do not appear to particularly agree on the answers or even have the data base of how, in fact, the business sector or an individual business itself would be affected.

Our interest was in figuring out how, in the regulatory process, the agency was going to get educated. I guess my thinking is that if you keep an agency out of the process, how does that become translated into agency understanding and use of material that comes out of the negotiations.

I pose this as a question only. I am not stating that we have got to get an agency necessarily involved in the program design, somehow or other, since we have no formal policy yet.

Senator LEVIN. Your first statement of how does an agency get educated as a result of that participation, that is one question, and then you have the public comment period and they come in saying, 'Look, we get the coal company, the Sierra Club, and we have all these parties coming before you and tearing you apart from different understandings, and some go to court. That is the way they got educated.

We heard testimony yesterday to the effect that there was impact on the regulatory process from recommendations of this kind and somehow they got educated. I would say that they can be educated through the public comment period.

My question is: Does that sound like it might be a joint decision, at least listing it in advance? That raises the problem of all the other parties that want to be heard that would challenge that in 2 minutes. Can the Government give its sanction to one group, while representation of others, although hopefully certain, is not guaranteed. So, that is my answer to your question.

Let me, at this point, turn it over to Senator Boschwitz.

Senator BOSCHWITZ. Let me tell you, gentlemen, that while my record normally shows that I might have rapport with the business side of both problems. Being a businessman I find your testimony—after listening to testimony for a couple of days—to the problems very discouraging. You talk about antagonisms of a sort, Mr. Fleeharty, and then you talk about the regulatory process. Perhaps the regulatory process deserves these kinds of comments, but, if you were negotiating with me and I were a regulator, you would have an awfully hard time. But, when you come here with this kind of testimony it leads me to believe it must be very difficult for you to negotiate. When I think of people making comments like this going and negotiating with the various agencies I would imagine that it must limit your effectiveness very much.

That is more in terms of a comment and not a question.

Mr. JOSEPH. If I could comment in response to that—

Senator BOSCHWITZ. I don't know if you are thinking more along the lines of things about the regulatory process, why you don't have an opinion about what we are asking you this morning.

Mr. JOSEPH. We have staff——

Senator BOSCHWITZ [continuing]. Everybody we have talked to has got staff.

Mr. JOSEPH. We are a democratic organization trying to give a position. If you were a member businessman, you would not like the idea of a staffer running around making decisions that you did not contribute to.

Senator BOSCHWITZ. My impression from the regulators we have heard this morning is they appeared to be quite openminded about the process.

Mr. JOSEPH. I can see an agency that is run by lawyers: they are trained to win cases, they are trained to be adversarial.

Senator BOSCHWITZ. You told me they just came out of law school, and they are not trained in anything.

Mr. JOSEPH. They are trained to be adversarial.

Mr. FLEEHARTY. I would hope that we are not misunderstood. The attitudes that we in any way reflect here are not the same attitudes we would expect businessmen to go to negotiations with.

Senator BOSCHWITZ. How can you say that after you tell them what you think, after you go into negotiations, tell them what nice folks they are.

Mr. FLEEHARTY. That does not mean that a deep-seated resentment must block all progress. That is what labor negotiation, for example, is all about.

Senator BOSCHWITZ. We are not talking about labor/management negotiations. You are a national association——

Mr. FLEEHARTY. I think that the reason people negotiate is that they have differences in opinions, and what they generally discuss is the issues, not their residual emotions toward each other.

Senator BOSCHWITZ. Well, you know I am a relatively new Senator here in Washington, as is my colleage, Senator Levin, the chairman of this hearing. I would hope that all things will become somewhat more jaded over a period of time, but I would hope all these things about the regulatory process are not, in fact, the case. It was not my intention as a businessman that they were but my type of business was not such that I became involved with a great deal of regulatory oversight.

Mr. FLEEHARTY. We are looking for ways to break down that attitude.

Senator BOSCHWITZ. We are too, and that is why when you come in and treat it in this way, I do not see what you seek to accomplish. You do not have any position on what we are trying to do.

Mr. FLEEHARTY. Perhaps later in the year we will.

Senator LEVIN. I don't want to interrupt but the resolution as it is presently drafted may run into problems with its prohibition or intervenor funding.

Mr. JOSEPH. Mr. Schultz will address that.

Mr. SCHULTZ. Let me state that intervenor funding is a back door concept and the regulatory negotiation concept brings it through the basement window. There are a lot of concerns.

Senator LEVIN. Would you repeat that. I am not sure I follow. It sounded good but I am not sure I understand the underlying meaning.

Mr. SCHULTZ. Intervenor funding brings funding for special interest groups in through the back door. The regulatory negotiations concept, if it means Federal compensation for special interest groups, brings it through the basement window. Intervenor funding creates certain structures designated to fund certain groups in particular ways. It has become subject to considerable abuses. There are particular processes to define who participates and how that money is going to be allocated.

As far as regulatory negotiation is concerned, we do not have a formal policy, but one of the things that concerns me a great deal in the resolution is in subpart 4. That would be something of tremendous concern to us to the extent that it would create additional or improper interest group funding.

Senator LEVIN. I am very much concerned with that language—the way that it is drafted, I hope there is going to be a lot of changes made in the language.

Mr. JOSEPH. What you are talking about is organizing before and legislating after.

Senator LEVIN. Not necessarily.

Mr. JOSEPH. This is where we need policy consideration. The only way there will be a distinction is if other members clearly see it as something that has benefit and something that will pay off.

Senator LEVIN. I happen to agree. That is what it should be, but the way the resolution is drafted is, in fact, quite the opposite. It would seem, if I remember correctly——

Mr. JOSEPH. Then, the basement window—

Senator LEVIN. In the whole regulatory process, the public comment period is equally open to everyone. There may be a few parties that might want to comment, but those are the negotiations that count most.

Your earlier comments were based on the assumption that there was previous publication of a proposed regulation.

Mr. SCHULTZ. And because they are ex parte, you do not have to worry about the problems hurting your interests and the comments made by the previous witnesses.

We feel there are very strong reasons for the proposed regulation.

Senator LEVIN. I am still working with that regulation. My worry is when an agency participates, they would be guided disproportionately in terms of a legal position. It would be very tough for them to say in court that any position they take during the public comment period or that they participate in before the rule is even public. I am very much concerned that we not add problems to what we already have there. I think this mechanism has got some real beauty in voluntary participation and if we could stimulate it in any way—pushing it in a sense of the critical parties—obviously that would be beneficial. There would be a positive effect on the regulatory process and the agency.

I do not think that you could give your members assurances—the kind they will like—before they spent their time and invest the money involved here until we reach a point where the informal recommendations are accepted by an agency.

The result of your comments with Senator Boschwitz indicates that it could be counter productive.

Mr. JOSEPH. I am sorry that Senator Boschwitz cannot understand why we have limited ourselves——

Senator BOSCHWITZ. Senator Boschwitz doesn't not understand why you limit yourselves. Senator Boschwitz does not understand why you come in and attack the entire regulatory program and not have an opinion on what we are trying to do.

Mr. JOSEPH. That is——

Senator BOSCHWITZ. Pardon me. I look at things a little bit differently than Senator Levin. I look at it somewhat more pragmatically. I think it is a good idea to go forward and Senator Levin is trying, as a lawyer, perhaps, to put some bounds on me which should probably be there, and he will see to it that some of the legal considerations and ramifications are included in the recommendation.

I would like to see the regulatory agency involved as observers and not managers of it. I agree with Mr. Schultz.

Senator LEVIN. This would require more looking into and if you are able to give us anything further, it would be most helpful to us. I would hope that you would look at this positively. I have not seen any purpose that is hidden.

We have got to try to find a way to get parties to come together and find something meaningful to the regulatory process. The coal members' testimony is positive, as were others.

I do think that you could be making a contribution in a positive way which would be useful to us.

Any contribution that you could make would be very significant. So, any contribution that you could make to us on the process, you should do so.

Mr. JOSEPH. Well, Senator Levin, when we were asked to testify we said that we had no position and we wanted to come here today to convey to you our concern and to try to help you to seek ways to facilitate and improve the process. We wanted to show our willingness to get involved, and to make these kinds of contributions.

Perhaps, it may be necessary in terms of getting the proper policy decisions out of the Chamber, to have a spokesman for this proposal come and address our relevant policymaking committees and, perhaps, maybe any one of the Senators cosponsoring the resolution could come and address our people. We do represent a broad spectrum and there are a lot of people who would want to hear such a discussion.

Senator LEVIN. I am sure we will be happy to do that. As I was very critical of my friends in labor yesterday, today I would like to indicate that I believe what we need is not a recital of the regulatory problem.

But, I will tell you that the theme of this Congress is to be aware of the problems that surround us. Yesterday, I was critical of my labor friends for not understanding the mood of this country based on the reality facing small businessmen. The regulatory process has created tremendous problems for them. We need better understanding and to find ways for them to reflect some of their own interest and feelings.

So, today I suggest to you folks that we really need the assistance in terms of the mechanical experiment in this kind of thing. We need their constructive criticism rather than citing the evils of this process, which were very much two and two.

I think that you will find that this committee is very much aware of those problems. Everybody on this committee—both the Small Business Committee and the subcommittee—are really tuned in to some of the excess of the regulatory process.

So, we would welcome your criticisms and your suggestions. We know that you will make a great contribution no matter what side we shall come down on and we will send to you a final version—final in the sense of the way introduced in the resolution. I hope you will give us your critique of it.

Also, I know a number of us will be happy to meet with your membership and explain what it is intended to do. Perhaps, it will help you.

Mr. JOSEPH. We look forward to working with you and doing anything it takes to getting the regulatory problem straightened out.

Senator LEVIN. Thank you, again, for coming.

[Whereupon, at 11:55 a.m., the hearing was adjourned.]

[Subsequent information was received and follows:]

U.S. REGULATORY COUNCIL

Washington, D.C. 20560

DIRECTOR

OCT 29 1980

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Honorable Carl Levin, Chairman
Subcommittee on Government Oversight
Senate Committee on Government Affairs
Room 409C, Senate Courts
120 C Street, N.W.
Washington, D.C. 20510

Dear Mr. Chairman:

I appreciate this opportunity to work with your committee staff on the regulatory negotiation commission proposal.

My testimony raised many practical and theoretical questions about the draft proposal. I am very pleased to see that you addressed many of these issues in your current draft.

My detailed questions fell into several broad categories:

- o government involvement in the establishment and functioning of the negotiation commissions;
- o the appointment of the commissions;
- o the timing of commission negotiations within the regulatory process and the appropriate scope of issues for negotiation;
- o the applicability of the Administrative Procedure, Advisory Committee, and Sunshine Acts to the operation of the commissions.

As I stated in my testimony, the key to the success of the negotiation concept must be the voluntary investment of time and energy by private persons, the willingness to listen cooperate, and compromise. Your current draft increases the independence of a commission. But the fact remains that the commissions would be funded by the government, which would have the final authority to determine whether a proposed commission met the eligibility criteria.

As I cautioned in my testimony, I question whether such government involvement in the establishment of a commission is consistent with the purposes for which a commission would be established, namely to increase voluntary cooperation among private groups. Let me emphasize, I believe that such commissions once established could make a valuable contribution to regulatory reform, but direct government involvement may inherently undermine the independence and vitality of such a commission. To begin with, it would be preferable for an agency to encourage formation of a commission in ways short of public funding. If it is not possible to encourage formation of commissions without public funding, careful consideration can be given to more direct government involvement.

The new proposal more clearly defines the relationship between the commissions' work and the regulatory process. It limits the scope of work to areas of regulatory policy for which (1) major law has been enacted, but proposed rules and regulations have not been issued; (2) final rules and regulations have been issued, but are likely to undergo major revision; or (3) basic statutory changes are contemplated. As stated in my testimony, I do not believe it is appropriate for the government to become involved in the establishment of a commission if at the same time an agency is engaged in a rulemaking proceeding concerning the same issue. It is not likely during such a proceeding that interested private parties would be willing to cooperate and compromise their differences. But government involvement in any such effort could be inconsistent with the legal duty of the agency to base its final decision on the rulemaking record. An agency cannot delegate that decisional authority to any private entity.

Although such commissions might be less useful in the context of a rulemaking proceeding, they might be particularly helpful where there does not as yet exist either laws or regulations. In these cases, a commission could focus on ways to avoid the need for government regulation.

I would question the decision to limit commissions to the areas of health, safety, and environmental regulatory policy. The President's Automobile Industry Committee and the Tripartite Committee on the steel industry demonstrate that the philosophy of consensus building can apply equally well to areas of economic regulation.

The new proposal addresses the issue of how regulatory negotiation commissions fit into the current statutory scheme of Administrative Procedure, Advisory Committee, and Sunshine Acts and the related issue of ex parte communications. The provision that precludes judicial review of eligibility determinations anticipates and addresses possible future problems.

If, however, the government does not fund a commission, there is much less need for concern about many of these and other legal issues.

I would suggest that rather than begin in the manner proposed in the Bill, that Congress direct one or more agencies to take steps to encourage formation of a negotiation commission and to provide a detailed evaluation to Congress of the success of such effort. Based upon this experience it will be possible for both the Administration and the Congress better to evaluate the appropriate degree of government involvement in furthering this innovative concept.

I appreciate the close attention you gave to the questions I raised in my testimony. If I can be of further assistance, please contact me.

The OMB has advised that there is no objection from the standpoint of the Administration's program to the presentations of this report to the Congress.

Sincerely,

Kate Beardsley

Kate C. Beardsley
Deputy Director